92-1994

No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION,
JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June 15, 1993

35 pp

QUESTIONS PRESENTED FOR REVIEW

Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception to the final judgment rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Geana J. Dunkin and David L. Smith hereby request this Court to issue a writ of certiorari to review the order of the United States Court of Appeals for the Tenth Circuit entered in this case on February 11, 1993.

OPINIONS BELOW

The orders entered by the United States Court of Appeals for the Tenth Circuit on February 11, 1993 and March 17, 1993 are included in the Appendix at 1a and 215a, respectively.

The order, the order protecting confidential information, and the special order of reference to United States magistrate judge--all entered by the United States District Court for the District of Colorado on July 16, 1992--are included in the Appendix at 121a, 126a, and 131a, respectively. The reporter's transcripts of the hearings in the United States District Court for the District of Colorado on July 9, 1992, July 16, 1992, December 3, 1992, and December 10, 1992 are included in the Appendix at 5a, 12a, 137a and 184a, respectively.

JURISDICTION

The date of the entry of the order sought to be reviewed is February 11, 1993.

The date of the entry of the order respecting a rehearing is March 17, 1993.

Jurisdiction of this Court to review the order in question by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291

28 U.S.C. § 1927

Fed. R. App. P. 38

10th Cir. R. 46.5

STATEMENT OF THE CASE

This case was filed in the United States District Court for the District of Colorado on February 7, 1992, United States District Judge Edward W. Nottingham presiding. In her complaint, plaintiff Geana J. Dunkin stated claims for relief pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Civil Rights Act of 1991; the Colorado Antidiscrimination Act of 1957, C.R.S. §§ 24-34-301 et seq.; and Colorado common law.

On July 9, 1992, Judge Nottingham held a hearing and announced his order granting the motions for protective orders filed by defendants Louisiana-Pacific Corporation, James Beldin, and Douglas Eddins;[1] imposing sanctions (including harsh verbal reprimands) against

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[1]Judge Nottingham granted defendants' motions for protective orders even though the defendants failed to show "good cause" for a protective order under Fed. R. Civ. P. 26(c). See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Specifically, the

Ms. Dunkin and/or her attorney, David L. Smith (a sole practitioner in Denver, Colorado), for refusing to sign the confidentiality agreement proposed by the defendants with respect to the documents to be produced to Ms. Dunkin in the case;[2] and requiring Ms. Dunkin to obtain approval of her depositions and other discovery requests from a United States magistrate judge as a condition precedent to conducting any discovery in the case.[3] In connection with the sanctions imposed against Ms. Dunkin and her attorney, Judge Nottingham ordered the defendants to file their applications for attorney fees by July 13, 1992, and set a hearing for July 16, 1992, at 6 a.m., to resolve any disputed matters relating to the applications.

On July 16, 1992, Judge Nottingham held a hearing on defendants' applications for attorney fees and announced his orders

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defendants failed to show that the documents and information sought to be protected were subject to any confidential information privilege.

[2]The confidentiality agreement proposed by the defendants was exceedingly broad in scope, covering virtually every document to be produced to Ms. Dunkin in the case, as well as all information obtained from such documents, and requiring the plaintiff to follow burdensome and expensive procedures for use of the documents and information at depositions and at trial.

[3]Under the stipulated scheduling and discovery order signed by the attorneys for the parties and by Judge Nottingham, and entered by Judge Nottingham on May 28, 1992, discovery, including the depositions of the parties and more than 38 witnesses, was to be completed by September 25, 1992.

awarding attorney fees of $4,060.00 against Ms. Dunkin's attorney; requiring Ms. Dunkin's attorney to pay this amount to the defendants on or before July 27, 1992; and denying Ms. Dunkin's attorney's request for a stay of execution on the award of attorney fees pending appeal. Judge Nottingham then issued a written order awarding "an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time)," as well as a written order "protecting confidential information" and a written special order of reference to United States magistrate judge imposing additional burdensome and illegal conditions on Ms. Dunkin's discovery in the case. Throughout Judge Nottingham's verbal and written orders, Ms. Dunkin's attorney was attacked, reprimanded and vilified in the harshest conceivable terms.

On July 27, 1992, Ms. Dunkin and her attorney filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit with respect to Judge Nottingham's July 16, 1992 orders.

On July 28, 1992, the defendants filed with the district court their motions to dismiss Ms. Dunkin's civil rights case with prejudice or, alternatively, to condition production of documents upon payment of attorney fees, and to show cause why Ms. Dunkin's attorney should not be held in contempt of court. The basis for these motions was Ms.

Dunkin's attorney's refusal to obey Judge Nottingham's July 16, 1992 order to pay $4,541.25 in attorney fees to the defendants on or before July 27, 1992.

On August 10, 1992, the court of appeals ordered the parties simultaneously to serve and file memorandum briefs in support of their respective positions on the following jurisdictional issue:

> Whether the order being appealed is appealable at this time? See: G.J.B. & Assoc., Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990).

On August 28, 1992, the defendants filed with the court of appeals their motion requesting sanctions to be imposed against Ms. Dunkin and her attorney for filing a frivolous appeal. The defendants also filed their memorandum brief in support of their position on the jurisdictional issue identified by the court of appeals, and in support of their motion for sanctions.

On August 31, 1992, Ms. Dunkin and her attorney filed with the court of appeals their memorandum brief in support of their position on the jurisdictional issue identified by the court of appeals, and their suggestion for hearing en banc.

On November 2, 1992, Ms. Dunkin and her attorney filed with the court of appeals their response to defendants' August 28, 1992 motion for sanctions.

On December 3, 1992, Judge Nottingham held a hearing and announced his order denying Ms. Dunkin's motion for reconsideration of the order announced by United States Magistrate Judge Bruce D. Pringle on October 29, 1992 at the deposition of defendant Douglas Eddins, and imposing sanctions against Ms. Dunkin and her attorney pursuant to Local Rule 602C of the Local Rules of Practice of the United States District Court for the District of Colorado and/or Fed. R. Civ. P. 37. In his October 29, 1992 order, Magistrate Judge Pringle held that discrimination against Hispanic employees of defendant Louisiana-Pacific Corporation who worked at the "stacker building" near the Walden, Colorado sawmill was not relevant to the subject matter of the pending action under Fed. R. Civ. P. 26(b), and sustained the objection of defendants' attorney to related deposition questions asked by Ms. Dunkin's attorney. At the December 3, 1992 hearing on the motion for reconsideration of Magistrate Judge Pringle's October 29, 1992 order, Judge Nottingham conceded that discrimination against Hispanic employees of defendant Louisiana-Pacific Corporation was relevant to the subject matter of the pending action under Fed. R. Civ. P. 26(b), but concluded that Magistrate Judge Pringle's October 29, 1992 order was not "clearly erroneous" or "contrary to law" under Local Rule 602C, which carries a mandatory assessment of attorney fees

against the losing party on a motion for reconsideration of a magistrate's ruling. When Ms. Dunkin's attorney argued that the attorney fee provision of Local Rule 602C was beyond the scope of authority granted by 28 U.S.C. § 636, Judge Nottingham indicated that Fed. R. Civ. P. 37 was an alternative basis for assessing attorney fees in this situation, and ordered the defendants to file their applications for attorney fees and costs against Ms. Dunkin's attorney by December 8, 1992.

On December 10, 1992, Judge Nottingham held a hearing on defendants' applications for attorney fees and costs and announced his order awarding attorney fees and costs of $1,870.93 against Ms. Dunkin's attorney; requiring Ms. Dunkin's attorney to pay this amount to the defendants on or before December 16, 1992; and denying Ms. Dunkin's attorney's request for a stay of execution on the award of attorney fees and costs pending appeal. Throughout Judge Nottingham's December 3, 1992 and December 10, 1992 orders, Ms. Dunkin's attorney was attacked, reprimanded and vilified in the harshest conceivable terms.

On December 15, 1992, Ms. Dunkin filed her motion for Judge Nottingham to recuse himself from the case pursuant to 28 U.S.C. § 455(a), arguing that "what is apparent from a review of the record in this case is that while no legal or factual basis existed for imposing

sanctions against the plaintiff and plaintiff's attorney, Judge Nottingham nevertheless did so over plaintiff's objections, while refusing to impose sanctions against the defendants and defendants' attorney for refusing to obey Judge Nottingham's previous orders to produce all of the documents requested by the plaintiff, and refusing to permit the plaintiff to take the depositions of witnesses with knowledge relevant to the case"; that "as the result of this situation, the plaintiff has been deprived of her right to pursue her lawsuit (including her right to defend against defendants' promised summary judgment motion) in accordance with the intent of Congress in passing the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, and the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991"; that "Judge Nottingham has exceeded his jurisdiction and abused his power and discretion, in violation of Article III and the due process clause of the Fifth Amendment to the United States Constitution, and the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 1"; and that "it is therefore clear that Judge Nottingham's impartiality might reasonably be questioned in this case." Ms. Dunkin's motion for Judge Nottingham to recuse himself from the case, which was stayed by Judge Nottingham pending resolution of the motion, is still pending before Judge Nottingham.

On December 16, 1992, Ms. Dunkin and her attorney filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit with respect to Judge Nottingham's December 3, 1992 and December 10, 1992 orders.

On December 31, 1992, the defendants filed their motion to dismiss and for sanctions, and their supporting memorandum brief, requesting the court of appeals to dismiss the December 16, 1992 appeal filed by Ms. Dunkin and her attorney, and requesting the court of appeals to impose sanctions against Ms. Dunkin and her attorney for filing a frivolous appeal.

On January 5, 1993, the court of appeals ordered Ms. Dunkin to respond to defendants' December 31, 1992 motion to dismiss and for sanctions within ten days.

On January 12, 1993, Ms. Dunkin and her attorney filed their response to defendants' December 31, 1992 motion to dismiss and for sanctions, their request for oral argument, and their suggestion for hearing en banc.

On February 11, 1993, a hearing panel of the court of appeals composed of circuit judges Moore, Tacha, and Baldock entered its unpublished order dismissing, without oral argument, the appeals filed by Ms. Dunkin and her attorney, and imposing additional sanctions

against Ms. Dunkin's attorney for filing alleged frivolous appeals. The hearing panel remanded the case to Judge Nottingham for a determination of reasonable attorney fees for each defendant for defending the appeals.

On February 25, 1993, Ms. Dunkin and her attorney filed their petition for rehearing and suggestion for rehearing en banc.

On March 17, 1993, the hearing panel that rendered the February 11, 1993 decision denied the petition for rehearing filed by Ms. Dunkin and her attorney. Further, their suggestion for rehearing en banc was denied by the court of appeals.

ARGUMENT

In its (February 11, 1993) unpublished order, the hearing panel of the court of appeals discussed its decision to dismiss, without oral argument, the appeals filed by Ms. Dunkin and her attorney, as follows:

> The law is well established in this circuit that an order sanctioning counsel currently of record is not appealable before entry of final judgment. "A sanction order against an attorney currently of record is not a final decision for purposes of § 1291 appeal where the underlying controversy remains unresolved." G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). Nor are the orders appealable under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) collateral order exception to the final judgment rule. 913 F.2d at 829.

In the Singleton case cited by the hearing panel, the court of appeals said:

> Despite their general agreement on the interlocutory nature of a sanction order against counsel of record, the circuit courts are sharply divided on the question of whether such an order is immediately appealable as an exception to the "final decision" rule under the collateral order doctrine first announced in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). [Footnote omitted.] "To come within the 'small class' of decisions excepted from the final-judgment rule by Cohen, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." Coopers Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)(emphasis added). . . .
>
> Since Cohen, the Supreme Court has attempted to define when an order is "effectively unreviewable on appeal from a final judgment." In United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971), the Court indicated an appeal of a collateral order is permissible only when the "denial of immediate review would render impossible any review whatsoever of an individual's claims. . . ." And in United States v. MacDonald, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552-53, 56 L.Ed.2d 18 (1978), the Supreme Court described the third requirement of Cohen as involving "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial. . . ."

Id. at 827-28. The court of appeals then held that an order sanctioning counsel currently of record is not effectively unreviewable on appeal from a final judgment, and that such an order is therefore not immediately appealable under the Cohen collateral order exception to the final judgment rule. Id. at 829.

In the present case, Judge Nottingham has entered orders imposing sanctions totalling $6,412.18 against Ms. Dunkin's attorney,

and requiring Ms. Dunkin's attorney to pay the sanctions imposed against him to the defendants within a few days after entry of the orders. Under these circumstances, Judge Nottingham's orders conclusively determined the disputed question of sanctions, and resolved this important issue completely separate from the merits of the action. If Ms. Dunkin ultimately prevails on the merits, or if the case is settled, Ms. Dunkin's attorney might never be able to receive any appellate review of Judge Nottingham's orders if he is denied that opportunity now. Judge Nottingham's orders are therefore effectively unreviewable on appeal from a final judgment, and are clearly immediately appealable under the Cohen collateral order exception to the final judgment. By holding otherwise in the present case, the court of appeals has decided a federal question in a way that conflicts with an applicable decision of this Court.

The court of appeals has also rendered a decision in conflict with the decisions of other United States courts of appeals on the same matter. See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985)(leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985)(fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990)(referring to conclusion of sanctions matters

as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990)("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988)("[S]anction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987)("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986)(fee award against counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989)(fee award against counsel appealable), cert. denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990); Ortho Pharmaceutical Corp. v. Sona Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988)("When a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order");

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985)(fee award against a former counsel is appealable collateral order).

The court of appeals has also so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's power of supervision, and has decided an important question of federal law which has not been, but should be, settled by this Court.

In its (February 11, 1993) unpublished order, the hearing panel of the court of appeals discussed its decision to impose additional sanctions against Ms. Dunkin's attorney for filing alleged frivolous appeals, as follows:

> The defendants seek the imposition of sanctions pursuant to 28 U.S.C. § 1927, Fed. R. App. P. 38, and 10th Cir. R. 46.5. The plaintiff and her counsel have filed responses to the requests. See Braley v. Campbell, 832 F.2d 1504, 1514-1515 (10th Cir. 1987).
>
> Under Fed. R. App. P. 38 "just damages and single or double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous when "the result is obvious, or the appellant's arguments of error are wholly without merit." Braley v. Campbell, 832 F.2d at 1510 (citations omitted).
>
> Sanctions are appropriate in this case. Counsel for the plaintiff not only pursued appeal no. 92-1230 after he was informed by this court of a jurisdictional defect but also filed another appeal with the identical defect. As noted above, the law is clear and well settled in this circuit regarding the appealability of these orders.

. . .

> These appeals are DISMISSED and the cases REMANDED for a determination of reasonable attorney fees for each defendant for defending these appeals. Those fees shall be imposed against counsel for plaintiff, but not plaintiff. See Braley v. Campbell, 832 F.2d at 1512-1513.

In Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990), this Court established the following standard to be applied in reviewing all aspects of a district court's Rule 11 determination:

> [A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

Presumably, the same abuse-of-discretion standard would be applied by this Court in reviewing all aspects of an appellate court's determination of attorney sanctions under 28 U.S.C. § 1927, Fed. R. App. P. 38, and 10th Cir. R. 46.5.

Under 10th Cir. R. 46.5, an appeal warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law is not frivolous.

In the present case, the hearing panel imposed additional sanctions against Ms. Dunkin's attorney for filing alleged frivolous appeals, and remanded the case to Judge Nottingham for a determination

of reasonable attorney fees for each defendant for defending the appeals. These actions were taken even though the appeals were warranted by this Court's decision in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and by a good faith argument for the extension, modification, or reversal of the court of appeal's decision in G.J.B. & Assoc. v. Singleton, 913 F.2d 824 (10th Cir. 1990).

Under the foregoing circumstances, the hearing panel based its ruling that the appeals filed by Ms. Dunkin and her attorney were frivolous on an erroneous view of the law and on a clearly erroneous assessment of the evidence, and the court of appeals has decided a federal question in a way that conflicts with an applicable decision of this Court. The court of appeals has also so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's power of supervision, and has decided an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

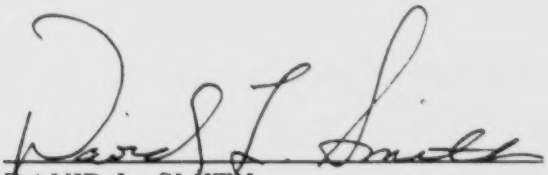
By holding that an order sanctioning counsel currently of record is not effectively unreviewable on appeal from a final judgment, and that such an order is therefore not immediately appealable under the Cohen

collateral order exception to the final judgment rule, the court of appeals has decided a federal question in a way that conflicts with an applicable decision of this Court. The court of appeals has also rendered a decision in conflict with the decisions of other United States courts of appeals on the same matter; has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's power of supervision; and has decided an important question of federal law which has not been, but should be, settled by this Court.

By imposing additional sanctions against Ms. Dunkin's attorney for filing alleged frivolous appeals, even though the appeals were warranted by existing law and by a good faith argument for the extension, modification, or reversal of existing law, the court of appeals has decided a federal question in a way that conflicts with an applicable decision of this Court. The court of appeals has also so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's power of supervision, and has decided an important question of federal law which has not been, but should be, settled by this Court.

Ms. Dunkin and her attorney therefore request this Court to grant their petition for a writ of certiorari to the court of appeals.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

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VOLUME I OF APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,	)	No. 92-1230
	)	
Defendants-Appellees,	)	
	)	
----------	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	
GEANA J. DUNKIN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 92-1381
	)	
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DOUGLAS EDDINS,	)	
	)	
Defendants-Appellees.	)	

ORDER

Filed: **February 11, 1993**

Before MOORE, TACHA, and BALDOCK, Circuit Judges.

The captioned appeals are jurisdictionally defective because the orders being appealed are not appealable before entry of final judgment.

Both appeals arise out of the same district court action. In appeal no. 92-1230, counsel for plaintiff and plaintiff appeal an order of the district court imposing sanctions on counsel for the plaintiff for violation of discovery orders. The order being appealed in No. 92-1381 imposed attorney fees on the plaintiff's counsel under Local Rule 602 C which provides that "[p]arties seeking or responding to a reconsideration of a magistrate's order should expect that attorney's fees will be awarded to the prevailing party on such review." No final judgment has been entered in the underlying action.

The law is well established in this circuit that an order sanctioning counsel currently of record is not appealable before entry of final judgment. "A sanction order against an attorney currently of record is not a final decision for purposes of § 1291 appeal where the underlying controversy remains unresolved." G.J.B. & Assoc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). Nor are the orders appealable under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S.

541 (1949) collateral order exception to the final judgment rule. 913 F.2d at 829.

The defendants seek the imposition of sanctions pursuant to 28 U.S.C. § 1927, Fed. R. App. P. 38, and 10th Cir. R. 46.5. The plaintiff and her counsel have filed responses to the requests. See Braley v. Campbell, 832 F.2d 1504, 1514-1515 (10th Cir. 1987).

Under Fed. R. App. P. 38 "just damages and single or double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous when "the result is obvious, or the appellant's arguments of error are wholly without merit." Braley v. Campbell, 832 F.2d at 1510 (citations omitted).

Sanctions are appropriate in this case. Counsel for the plaintiff not only pursued appeal no. 92-1230 after he was informed by this court of a jurisdictional defect but also filed another appeal with the identical defect. As noted above, the law is clear and well settled in this circuit regarding the appealability of these orders.

Appellee's Motion to Strike the Response of Plaintiff-Appellant and Her Attorney is denied as moot.

These appeals are DISMISSED and the cases REMANDED for a determination of reasonable attorney fees for each defendant for defending these appeals. Those fees shall be imposed against counsel

for plaintiff, but not plaintiff. See Braley v. Campbell, 832 F.2d 1512-13.

Entered for the Court
ROBERT L. HOECKER, Clerk

/s/ Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	92 N 243
	)	
LOUISIANA-PACIFIC, et al.,	)	
	)	
Defendants.	)	

HEARING
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 6:20 a.m. on the 9th day of July, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For the Defendant:

Cecil Raymond Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

PROCEEDINGS

(At 6:20 a.m. on July 9, 1992, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, with Mr. David L. Smith appearing as counsel for the plaintiff and Mr. Cecil Raymond Hedger appearing as counsel for the defendants, the following proceedings were had:)

THE COURT: 92 N 243, Dunkin versus Louisiana-Pacific Corporation and others. I'll take the appearances of counsel in this matter.

MR. SMITH: Your Honor, I'm David Smith on behalf of the plaintiff, Geana Dunkin.

MR. HEDGER: Your Honor, Cecil Hedger for Louisiana-Pacific, Douglas Eddins and James Beldin.

THE COURT: All right, there are several motions for protective order on file with the Court.

Mr. Smith, you haven't responded to any of them. Do you want to tell me what your position on all of this is?

MR. SMITH: Your Honor, as you mentioned, there are three separate motions pending for protective order. These motions are

directed basically first to a document request that I sent out back in May of 1992. There has been no productions of documents under that document request.

THE COURT: Right, because they'd like to do it under a confidentiality order.

MR. SMITH: Yes, Your Honor.

THE COURT: Do you--have you--do you object to a confidentiality order?

MR. SMITH: Yes, I do.

THE COURT: Why?

MR. SMITH: Well, the information is not confidential, and of course the burden is on the person making the motion for a protective order to show that it is confidential. This is not an oppressive document request. It's a pretty standard document request in a case of this type. I don't see that there is any ground for a protective order.

THE COURT: Well, they're asking for--you're asking for personnel files. Personnel files are sometimes regarded as confidential because they reveal information that the employees regard as private.

MR. SMITH: Your Honor, the defendants' counsel has not permitted me to see any of this information. I have no idea whether there is confidential documentation in any of these files or not.

THE COURT: Well, I have an idea whether there's confidential information. If it's personnel information about other people, then it's regarded as private, Mr. Smith. How would you like to have somebody reaming through your personnel file, or the personnel files of the employees of your office?

MR. SMITH: Your Honor, I would submit that 99.9 per cent of the information to which this motion for a protective order has been made is not confidential information.

THE COURT: Well, some of it is. The personnel files are confidential information. Medical records are confidential information.

MR. SMITH: Your honor [sic], I have sent out a set of interrogatories that have never been responded to. We can't even get the names of the people who counsel is saying their personnel files and medical records, as you have identified, should be turned over. We don't--we can't even get the names of the people involved. There has been no response to discovery in this case from the defendants.

THE COURT: All right. Do you have anything else to say?

MR. SMITH: In addition to the documents, there is a motion for protective order relating to the depositions also. The depositions have been totally stopped in this case because even though we have a discovery schedule setting all of these depositions, that counsel refuses

to go forward with them. And so the motion for protective order is not only related to these documents. It goes to the depositions--

THE COURT: Well, Mr. Smith, let me ask you a question about the depositions. Did you call Mr. Hedger before you scheduled 34 depositions to commence on July 9th, I guess it is, or whenever it was, July 6th at 9:00 a.m. and continue thereafter until completed? did you call him before you did that?

MR. SMITH: Your Honor, we entered into--that deposition notice was set pursuant to our stipulated discovery and scheduling order.

THE COURT: You know, I don't know how you understand these orders, Mr. Smith. When I enter a stipulated scheduling and discovery order that sets forth a list of depositions that you can take, that doesn't mean that you're entitled without so much as a "is it convenient for you, can you do it those days, are you on vacation" to opposing counsel and send those out and set them for a day certain, that doesn't mean that.

Is there anybody whose practiced in this court any length of time who thinks you can get away with that kind of thing?

All right, here's what I'm going to do. The motions for protective order are granted in whole.

Mr. Smith, it is my finding based on the materials in the file, based on the fact that you didn't call Mr. Hedger before scheduling any of those depositions, based on the fact that you have scheduled 34 depositions to start on July 6th and to "continue during reasonable time periods thereafter until completed at the offices of plaintiff's attorney," et cetera, based on the fact that you won't agree to any confidentiality order with respect to document requests that include medical records and personnel files and other files that are properly regarded as private, it is my request--it is my finding that you are engaged in a persistent course of harassment and discovery abuse.

You are not going to be permitted any discovery in this case until you justify it to a United States Magistrate. In other words, before you set a single deposition in this case, you are going to tell the magistrate why it is that you need to take that deposition and why that deposition--why you can't get the discovery by other means and why that deposition is necessary.

This case is a straightforward simple Title 7 case. It is practically unheard of to schedule 35 or 40 depositions in a case such as this. I think you're just harassing the defendant, and if you're not, then you can justify your position to the United States Magistrate. Is that clear?

MR. SMITH: Yes, Your Honor.

THE COURT: The defendant is awarded all of its costs and attorneys fees on all of these motions.

Mr. Hedger, you will file that by--your request for costs and attorneys fees by Monday the 13th of July. If there's any necessity for a hearing, I'll hear this on the 16th of July at 6:00 a.m.

MR. HEDGER: Yes, Your Honor.

(6:30 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

July 14, 1992

/s/ Mary C. Chevalier
Federal Reporting Service, Inc.
17454 E. Asbury Place
Aurora, Colorado 80013
(303) 751-2777

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	92 N 243
	)	
LOUISIANA-PACIFIC CORPORATION, et al.,	)	
	)	
Defendants.	)	

HEARING - ATTORNEY FEES
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 6:40 a.m. on the 16th day of July, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
1630 Welton Street, #300
Denver, Colorado 80202

For the Defendants:

Cecil Raymond Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

PROCEEDINGS

(At 6:40 a.m. on July 16, 1992, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, with Mr. David L. Smith appearing as counsel for the plaintiff and Mr. Cecil Raymond Hedger appearing as counsel for the defendants, the following proceedings were had:)

THE COURT: Case 92 N 143, Dunkin versus Louisiana-Pacific Corporation. This is the final case that I have. Am I missing something? I see other people in the courtroom. Are you here on one of these two cases?

All right, I'll take the appearances of counsel in this matter.

MR. SMITH: Good morning, Your Honor. David Smith on behalf of the plaintiff.

MR. HEDGER: Your Honor, Cecil Hedger on behalf of Louisiana-Pacific, Douglas Eddins and James Beldin.

THE COURT: All right. The matter is here on several related motions. Let's take up the motion for approval of attorney's fees. I believe that the plaintiff objects to that. Is that correct, Mr. Smith?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Mr. Hedger, do you have any further information or proof that you wish to present to the Court on the matter of your attorney fees?

MR. HEDGER: Your Honor, I'm prepared to call Mr. Bernie Siebert as a witness with respect to the amount of time as set forth in the motion and affidavit in terms of reasonableness, as well as the hourly rate that's set forth in the motion for reasonableness, and I'm prepared to make an offer of proof if the Court would allow. I have my original handwritten daily diaries that I would share in camera with the Court. I have the computer printout of the time involved with respect to June 17 forward through July the 10th, part of which is redacted, but I would share the original with the Court if it would become necessary.

The time expended and set forth in the motion for the affidavit was my time only, Your Honor. I did not ask this Court to award fees with respect to Mr. Tishie's involvement in Spokane, Washington, co-counsel for Louisiana-Pacific. I did not, Your Honor, ask for any time with respect to associate involvement, particularly in light of the Chinese exercise, if you will--and I don't mean that as a criticism for our friends across the Pacific--but July the 1st and the 2nd was incredible trying to find out who was subpoenaed and who was

going to appear and to attempt to find out from Mr. Smith what was going on on the thing. And that's 3.6 hours of my time.

I had legal assistants trying to call witnesses that were listed on these notices of deposition, and I had an associate lawyer. Additionally, I've had research costs involved that were not requested in my motion and affidavit for purposes of preparing at least the first protective order concerning confidentiality, et cetera, and I'm prepared to make an offer of proof or I'm prepared to call a live witness and offer exhibit testimony.

THE COURT: Well, your representation is that the Exhibit A to your affidavit that was filed on July 13th is based on detailed contemporaneous time records?

MR. HEDGER: That is correct, Your Honor, and I have those records in the court for the Court's opportunity to inspect and review.

THE COURT: Well, I take it that you're not offering to give them to plaintiff's counsel because your contention is they contain privileged information?

MR. HEDGER: That is correct, Your Honor.

THE COURT: Well, Mr. Smith, do you dispute that he kept detailed time records?

MR. SMITH: Your Honor, I don't have enough information to admit or dispute that matter--admit or deny.

THE COURT: All right, you'd better proceed with your proof, Mr. Hedger.

MR. HEDGER: By an offer of proof or with my witness?

THE COURT: Well, I think--start out with your witness, why don't you.

MR. HEDGER: Your Honor, at this time, defendants would call Mr. Bernie Siebert.

WALTER V. SIEBERT

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, and please spell your last name.

THE WITNESS: It's actually Walter V. Siebert, S-i-e-b-e-r-t.

DIRECT EXAMINATION

BY MR. HEDGER:

Q Do you go by any other name, Mr. Siebert?

A Yes, Bernie.

Q Bernie? Would you state your business address for the record, sir?

A 633 - 17th Street, Suite 3000, Denver, Colorado 80202.

Q Are you currently employed?

A Yes.

Q By whom?

A Sherman and Howard.

Q In what position, sir?

A I'm a partner there.

Q How long have you been a partner at the law firm of Sherman and Howard?

A Nine years.

Q Would you please describe briefly your educational background and legal work background to the Court?

A I graduated from, undergraduate, from the University of Nebraska in 1970 with a Bachelor of Arts degree in political science. I received my law degree from the University of Nebraska in 1972. In 1973, I commenced work as general counsel for Mountain States Employers Council doing strictly labor and employment work, became a partner at Sherman and Howard in '83, and again my work is limited 99 per cent to labor and employment work.

Q Mr. Siebert, have you, in the course of concentrating or focusing your expertise in labor and employment work, been involved in

the defense of litigation under Title 7 of the Civil Rights Act of 1964 as amended?

A Yes.

Q Could you describe briefly to the Court your involvement in that type of defense of Title 7 litigation?

A I couldn't estimate how many cases I've been involved in in terms of trials, probably 20 or more.

Q Mr. Siebert, have you ever testified as an expert in any state or federal court concerning reasonableness of attorney fees?

A Yes, I believe I did. I apologize, I don't remember the exact case, but I think I testified for Rod Smith in a case, but that was a number of years ago.

Q In what court was that testimony given, Mr. Siebert?

A I believe federal district court.

MR. HEDGER: Your Honor, at this time, I'd offer Mr. Siebert as an expert with respect to the fee application as set forth in the motion and affidavit.

THE COURT: All right. Mr. Smith, do you have objection?

MR. SMITH: No objection, Your Honor.

THE COURT: All right, you may proceed, Mr. Hedger.

Q (by Mr. Hedger) Mr. Siebert, have you had an opportunity to become familiar with the basic dispute in this action, and more particularly, the discovery dispute which led to the defendants filing three separate motions for a protective order?

A Yes, I have.

Q Describe to the Court specifically please, Mr. Siebert, what you did in order to review these matters prior to the hearing here today.

A Counsel provided me with copies of various documents, and I reviewed prior to today the complaint and answer, the stipulated scheduling and discovery order, plaintiff's first request for production of documents to defendants, defendants' response to plaintiff's first request for production of documents, motion for protective order requiring confidentiality agreement prior to inspecting documents requested to be produced, together with an Exhibit A, the proposed stipulation and order protecting confidential information.

I reviewed defendants' motion for protective order and for attorney's fees, plaintiff's notice to take depositions--that was the document that was filed or submitted on June 30 for the 30 plus deponents--the motion for protective order, a minute order scheduling the July 9 hearing issued by this Court, a memorandum to the file from Mr. Hedger regarding this Court's ruling on July 9th, plaintiff's request

for approval of discovery requests, plaintiff's motion for reconsideration, motion to compel and/or for sanctions, and certificate of compliance with Local Rule 403(g), defendants' response to plaintiff's request for approval of discovery, defendants' motion for approval of attorney's fees with affidavit, plaintiff's response to motion for approval of attorney's fees with affidavit, and plaintiff's request for sanctions pursuant to Federal Rule of Civil Procedure 11, and defendants' response to plaintiff's motion for reconsideration.

I also reviewed the complete contemporaneous time records kept by Mr. Hedger, and I also reviewed the redacted time records, as well as obviously the affidavit in support of the motion for attorney's fees.

Q Mr. Siebert, based upon your review of the materials that you've just testified to and based upon your 20 some odd years, or thereabouts, or practice in the employment and labor law field, do you have an opinion as to the reasonableness of the time devoted to the three motions for protective order?

A Yes.

Q What is that opinion?

MR. SMITH: Your Honor, I'm going to object to a line of questioning that asks him if he has an opinion as to the amount of time,

whether a specific amount of time is reasonable. That's really not a matter for an expert opinion. That's a factual matter that the trier of fact should determine, and I would object that that's not a proper matter for an opinion by an expert witness.

THE COURT: Overruled.

THE WITNESS: I'm sorry?

THE COURT: Overruled. You may answer.

A Yes. Give me just one moment, if I can find that document.

Q (by Mr. Hedger) Are you looking for the motion, Mr. Siebert?

A I was looking for, yes, defendant's--

MR. HEDGER: May I approach the witness, Your Honor.

THE COURT: Yes.

A Well, that's all right. I don't have it in front of me. I did review it, Your Honor. I did review the affidavit of Mr. Hedger. I did review, as I mentioned, the hours that Mr. Hedger lodged for that attorney fee request. I reviewed the contemporaneous records that Mr. Hedger kept, and I reviewed the redacted portions that he referred to in his statements to the Court made this morning.

It is my opinion that the hours expended by Mr. Hedger were reasonable, especially taking into account that those hours are solely Mr. Hedger's. He did not include time spent by any associates,

legal assistants or law clerks or, if appropriate, which I'm not sure, but he certainly didn't include any time spent by in-house counsel or any other outside counsel that represents the defendant.

THE COURT: All right.

Q (by Mr. Hedger) Mr. Siebert, could you describe for the Court what factors you consider in determining whether an hourly rate for legal service is reasonable?

A My primary consideration is what I view to be the market rates or the range of rates in the market. I view certainly the level of experience of the attorney involved, the knowledge of that attorney, that attorney's expertise in a particular area, that particular attorney's reputation and the quality of that person's work.

Q Mr. Siebert, would you mind sharing with the Court what your normal hourly billing rate is in your practice at Sherman and Howard in the employment labor law field?

THE WITNESS: Do I have to answer that, Your Honor?

THE COURT: I think it's a proper question.

A $225.00 an hour.

Q (by Mr. Hedger) Thank you, Mr. Siebert.

Mr. Siebert, do you have any personal knowledge of the reputation and standing of myself in the labor relations community in Denver, Colorado?

A Yes.

Q And what is that knowledge, Mr. Siebert?

A Well, the basis of my knowledge is the fact that our firm has worked with Mr. Hedger on several projects over the years. I've been personally acquainted with Mr. Hedger and have been involved with him in projects over the years. Mr. Hedger is a frequent speaker at seminars, represents many associations and his reputation as being one of the city's better employment law attorneys.

Q Mr. Siebert, do you have an opinion as to the $175.00 an hour that I have requested in my motion and affidavit for fees in this matter?

A Yes.

Q What is that opinion?

A That that is a reasonable rate.

MR. HEDGER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q (by Mr. Hedger) Mr. Siebert, I've handed you what has been marked for identification as Defendant's Exhibit A, and ask that you examine that document, please. And as you examine that document, if

you could, is that a copy of Harding and Ogborn's computer billing statement with respect to time entries that I shared with you for purposes of this hearing today?

MR. SMITH: Objection, Your Honor. I don't think this witness can identify this document on that basis.

THE COURT: Overruled.

A this [sic] is a document that I previously reviewed and previously testified concerning the redacted computer diary entries.

MR. HEDGER: Mr. Case, could you ask the witness to examine Defendant's Exhibit B?

And for the record, Your Honor, Exhibit A is time entries from June 17th through the end of June.

MR. SMITH: Objection, Your Honor. I don't know what that reference is. What are we doing? Is counsel now identifying the document or is the witness identifying the document?

THE COURT: Well, he was--I thought the witness was identifying the document as something that he had considered in forming his opinion. I suppose, if you insist, that counsel will eventually need to be sworn. That can be done, Mr. Smith.

Q (by Mr. Hedger) Mr. Siebert, handing you a document that's been marked for identification as Defendant's Exhibit B, an [sic] ask that you examine that, and if you can, could you identify it?

A Yes, this is again the same as Exhibit A, however, the dates are from July 1 through July 10. Again, these are partially redacted computer or typewritten entries of time and billings.

MR. SMITH: Objection, Your Honor. The witness does not have personal knowledge.

THE COURT: He can tell what--that's all they were represented to him to be and that's the basis for his opinion, Mr. Smith. That's all he's saying. Objection overruled.

Q (by Mr. Hedger) Mr. Siebert, how much time have you devoted to reviewing documents, visiting with me and preparing for this hearing today?

A I would estimate approximately two and a half hours between telephone calls, reviews of documents and meeting with you this morning.

MR. HEDGER: Your Honor that's all that I have at this time.

THE COURT: You'll be charging him at 225 an hour or have you settled that yet, or do you know?

THE WITNESS: No, Your Honor, we haven't settled that yet.

THE COURT: All right. In the event that there were an award, I would think that you'd be entitled to get something out of this hearing.

MR. HEDGER: And the defendants when it's appropriate, Your Honor, will so request of the Court that that be allowed.

THE COURT: Well, I'd like to get it wrapped all at once. We can come back here at 6:00 a.m. for a couple of months, which I'm sure we will do if that's what happens. Go ahead, Mr. Siebert.

THE WITNESS: I was just going to say I really, since it's not an issue, I certainly don't want to hold the Court up and I'd be happy to waive any fee to--

THE COURT: Well, that's up to you and Mr. Hedger.

THE CLERK: Are we moving A and B?

MR. HEDGER: Your Honor--excuse me. Thank you, Mr. Case.

At this time, request--move for admission of Defendant's Exhibit A and Defendant's Exhibit B.

THE COURT: All right. Is there objection?

MR. SMITH: Other than the authenticity objections I've already made, no, Your Honor.

THE COURT: All right. I'm not going to receive them right now because even though he relied on them, that doesn't mean that they're--they've been authenticated for purposes of admission. If there's a dispute, and it appears there is, Mr. Hedger, then I'm afraid you're going to have to be sworn and testify, evidently in narrative fashion, which I will permit.

Anything further of Mr. Siebert on direct?

MR. HEDGER: I have no further questions at this time, Your Honor.

THE COURT: Cross-examination, Mr. Smith?

CROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Siebert, when you first began your testimony a few minutes ago, you gave a long list of documents that you had reviewed prior to your coming here to testify today. One of the documents that you mentioned, and I can't give you the exact words you used, but I believe it was something like memo to file regarding ruling by Mr. Hedger. Do you recall that document?

A If I said that, I misspoke. I think I said a memo to the file from Mr. Hedger regarding this Court's rulings.

Q Do you have a copy of that document with you?

A Yes.

Q May I see that document, please?

MR. SMITH: May I approach the witness, Your Honor?

THE COURT: You may.

Q (by Mr. Smith) Mr. Siebert, this document is in the form of a question and answer, or a colloquy between Judge Nottingham and myself, Mr. Smith; is that correct?

A And I believe Mr. Hedger.

Q What is the source of this information?

A I have no idea. I just was given the document. I have no idea what the source of it is.

Q Does this--is this a document that in some way pertains to the July 9, 1992 hearing that was held in this case?

A That's what the document represents.

Q All right. Mr. Siebert, what do you know in terms of the identity of the deponents that were the subject of the motions for protective orders in this case?

A Mr. Smith, I'm not sure I understand your question.

MR. HEDGER: Your Honor, I'm going to object. This is way--number one, I don't understand the relevance of the question. But

number two, it's way beyond anything that I raised on direct examination, or it's going to be here shortly.

THE COURT: I think it will be shortly. I'll allow that one question.

A I'm sorry, Mr. Smith, I don't understand what you mean by what do I know about these people.

Q (by Mr. Smith) Do you know who the deponents were?

A Only from the pleadings that I have. I certainly don't know them personally. I know from the pleadings that you attempted--there was some dispute over two depositions involving whether documents needed to be produced in advance--

Q No, I'm not talking about the documents. I'm talking about the identity of the deponents. Do you know that the deponents who were the subject of these protective orders included three of the defendants in this case?

A Two, I believe.

Q Isn't it true that the depositions that were the subject of the protective order included Defendant Louisiana-Pacific Corporation, as well as Defendants Douglas Eddins and James Beldin?

A That's correct. I think there was a 30(b)(6) witness.

Q Do you know whether prior to the filing of these motions for protective order there was any stipulation between counsel, that is, Mr. Hedger and myself, regarding whether those depositions should be taken?

A My review of the documents show there was a stipulation as to an initial date for those depositions to be taken, yes. Is that what you're asking?

Q What documentation are you referring to there?

A I think there was some correspondence attached to a couple of the motions regarding the scheduling, and there was references that agreement had been reached between counsel as to the dates. I think there was--I apologize--but I believe a June 23 date and one other date that were set for depositions.

Q So it's your understanding from the documentation that you have reviewed that there was in fact an agreement that those depositions of those defendants would be taken on a date certain and at a time certain; isn't that correct?

A Initially, that's correct.

Q What do you mean by initially?

A Well, my understand, again, my interpretation of the correspondence was that you wanted certain documents to be produced

prior to those depositions. There was a dispute over the confidentiality order. It appeared to me then that there was some representation that the depositions would have to be split, in other words, you would start on that day, but subject to getting the documents, that there may be an additional day of depositions.

Q Well, what are you referring to for that information?

A There's a motion for protective order that was filed with the Court on June 10.

Q Well, no, I'm speaking of prior to the motions for protective order, is there any documentation that you are referring to that would indicate that the dates that Mr. Hedger and Mr. Smith agreed to were in some way conditional?

A Prior to my reviewing that document and the correspondence attached to it? No.

Q Well, what correspondence attached to it that refers to an earlier time indicates that those dates were in any way conditional?

A I'm sorry, could you repeat your question again, please?

Q What documentation are you referring to in the file which would indicate to you that prior to the filing of the motions for protective order, that the dates that Mr. Hedger and Mr. Smith had agreed that the

depositions of the defendants would be taken were in any way conditional?

A I don't think they were initially conditional. I think it became--the dates became an issue when the document and confidentiality provision became an issue.

Q And who made that an issue?

A Well, you know, objectively from the documents, it appears that Mr. Hedger on behalf of his client requested that you enter into a confidentiality order.

Q So isn't the answer that Mr. Hedger made that--

A Yes, Mr. Hedger was the one who proposed the confidentiality order.

Q And this was after counsel had entered into the stipulation that the depositions of the defendants would be taken on a date certain; isn't that correct?

A I'd have to double check which dates. I think--yes, I believe so. The scheduling order had the deposition of--the three depositions that you mentioned, if I'm reading this correctly.

Q And isn't it also true that sometime after Mr. Hedger and Mr. Smith determined that these depositions of the defendants would be taken on a date certain, that that information was placed in the form of a

proposed stipulated scheduling and discovery order for the Court's signature?

A If you're asking me was the--

Q I'm asking you whether that was reduced to that document.

A Well, the scheduling order says that the depositions--in Paragraph, it looks like 4C(2)(3), speak to the issue of the scheduling of those depositions.

Q And that document was signed not only by Mr. Hedger and Mr. Smith, but also by the Court; isn't that correct?

A Yes, it appears the Court signed the document on the 28th of May.

Q And isn't it true that that document confirms or ratifies what was previously agreed to between Mr. Hedger and Mr. Smith, despite the fact that Mr. Hedger was by that point raising the possibility that he wanted to have the plaintiffs sign a confidentiality agreement?

A I apologize, Mr. Smith, you kind of lost me on that one. Could you repeat the question?

MR. SMITH: Could I have the question repeated? I don't know if I can state it exactly that way.

THE COURT: No.

Q (by Mr. Smith) Isn't it true that that information was placed in the stipulated pretrial--or stipulated discovery and scheduling order signed by Mr. Hedger and Mr. Smith and the Court, even though that after the stipulation between Mr. Smith and Mr. Hedger, Mr. Hedger had raised his question as to whether Mr. Smith's client and himself should not be required to sign a confidentiality agreement?

MR. HEDGER: Your Honor, I'm going to object on the basis of lack of foundation. This witness does not know communications--unless he can lay foundation--but communications between myself and Mr. Smith concerning the issue of confidentiality that commenced way back early in May.

THE COURT: Well, the witness can answer whether he knows or not. The objection is overruled.

A I don't know. All I reviewed, Mr. Smith, were the documents. And I apologize, I--

Q (by Mr. Smith) Well, give me the sequence of events as you understand it relating to the stipulation between Mr. Smith and Mr. Hedger, second, Mr. Hedger's requirement, unilateral requirement, that a confidentiality agreement be signed and, third, the signing by counsel and the Court of the stipulated discovery and scheduling order. What is your understanding of the sequence of events?

A Mr. Smith, I don't know when conversations were initiated concerning discovery, the scheduling of discovery. I don't know when conversations were initiated concerning a confidentiality order. Again, I haven't--I just have no knowledge of those. The only thing I have is the--basically the documents that are in the Court's file, I presume. So I just can't testify as to when particular things took place. I can tell you when the scheduling order was signed.

Q And you can tell me when the protective order was signed; correct? Was made by counsel, that is.

A The confidentiality order?

Q The protective order, the motion for protective order.

A Yes, I can tell you when that was filed.

Q Does it make any difference to you as an expert witness that at the time that Mr. Hedger filed his motion for protective order with respect to the depositions of the defendants, that there was in fact a stipulated scheduling and discovery order signed by himself and opposing counsel and the Court with reference to those depositions?

A Mr. Smith, believe me I don't mean to be evasive, but my testimony really has gone to the issue of the fees requested by Mr. Hedger, and my opinion has gone to the area of the reasonableness, his reputation in the community, the reasonableness of the hours

expended. If you'd like me to comment on what's transpired in this case, I'd be most happy to do so, but I'm not sure that you really want that.

MR. SMITH: Well, Your Honor, the line of questioning I'm going down here, obviously it makes a big difference with respect to the reasonableness of the hours and the fees as to whether the motion for protective order was justified in the first place. I have a motion pending before the Court for reconsideration of that matter. I have asked for the Court to consider that matter, the reconsideration, before going into the attorney's fees issue. That's what makes logical sense to me. But here we are on the attorney's fee portion of it.

I believe that whether that protective order had good grounds to it is a crucial issue in determining whether the attorney's fees were reasonable or not, and I believe I have the right to ask the witness whether, in his determination of reasonableness, he took into consideration whether the protective order was well grounded from the beginning. And I know that that was not the basis of his original testimony regarding the reasonableness of this, but I am asking him a different question than Mr. Hedger asked him.

THE COURT: There was no objection to the question. The witness answered the question, and you made a speech.

MR. SMITH: Your Honor--

THE COURT: So I don't think any response is called for by me.

MR. SMITH: I would ask to check the record on that. The witness--

THE WITNESS: Well, I'd be happy to restate my answer.

MR. SMITH: --has not answered the question.

THE COURT: I think the witness answered the question, and asked you if you wanted to have him comment on the course of what happened here.

MR. SMITH: Maybe I can clarify my question then, because did you think that you had answered the question, Mr. Siebert?

THE WITNESS: Why don't we just start again and maybe we can--because I wasn't--I don't think I answered your question, but let's--

MR. SMITH: I didn't feel you answered the question, and I would like to ask it again and see if I can get an answer to it.

A Let me just tell you, if I understand your question correctly, you're asking me to comment or express my opinion as to the propriety of the protective ordered entered by this Court.

Q (by Mr. Smith) As to whether that would have any bearing on the number of hours that should have been spent with respect to this matter.

A The fact that the motion was granted?

Q No, the fact that the--whether the basis for the motion was sound enough for Mr. Hedger to have spent 23.2 hours on that motion.

A I guess I kind of feel like the Tenth Circuit here, but I think it's--

Q Well, let me rephrase the question.

A It's rather apparent--

Q Let's get into--let me re-ask the question. Apparently you're not following where I'm going with this.

Does the validity or the soundness of the motion that Mr. Hedger filed, that is the motion for protective order, in your opinion have any bearing on the number of hours that should have been spent in preparing that motion and doing all of the other things that Mr. Hedger says that he did with respect to this motion?

A Well, I guess--

Q Does it have any bearing?

A I wouldn't be here, Mr. Smith, if the Court had not granted his motion, because the only reason I'm here--

Q All right, we understand that the Court granted the motion. There is a motion for reconsideration pending, however.

A Would you like--

Q And I'm asking you whether the soundness of the motion has any bearing on the reasonableness of the number of hours that Mr. Hedger expended with respect to that motion and related items?

A No, because I don't think, if I understand your question correctly, I don't think Mr. Hedger's bills and time spent are based on the success of the motion. They're merely accurate time records of how much time Mr. Hedger spent preparing for that motion.

Q You mean if this had been a frivolous motion, Mr. Hedger still would have had--would have been justified in spending 23.2 hours on it because that's just the time that he billed on that motion; right?

A Well, had it been a frivolous motion, I wouldn't be here testifying as to it. You'd probably have an expert of your own up here. But it's a matter of how much time was spent on the motion, obviously, the amount of legal research, the amount of work that went into the preparation of that motion, and my understanding is the question is was that time reasonable, and I said yes.

THE COURT: All right. Mr. Smith, you're going to conclude your cross-examination of this witness in the next ten minutes. And at the end of the ten minutes, you will sit down.

MR. SMITH: Thank you, Your Honor.

Q (by Mr. Smith) As far as you're concerned, does the stipulated scheduling and discovery order have any bearing on the number of hours that Mr. Hedger should have spent on these motions and related items?

A No.

Q The fact that the Court and counsel agreed on a scheduling order for these depositions has no bearing on whether a motion for a protective order should have been made to stop those depositions?

THE COURT: You certainly should not include the Court in that agreement, Mr. Smith, because that's not the way I interpret that scheduling and discovery order.

MR. SMITH: Well, I maybe did misstate myself.

Q (by Mr. Smith) What I meant to say that there was a stipulated scheduling and discovery order signed by counsel. That order was also signed by the Court.

A The Court obviously approved of the order that the parties had agreed upon, would be my interpretation of that. A Rule 16 scheduling

and discovery order is, in my view, an outline of what is to transpire in the time deadlines set on that so that the parties and the Court can properly manage the case and move that case along in an orderly fashion.

Q Are the parties supposed to follow that scheduling order?

A Certainly with respect to the time limitations and any limitations that might be set forth.

Q And if Mr. Hedger's motion for protective order was based on the fact that he just didn't want to go forward with the depositions that the parties had already agreed to--

MR. HEDGER: Your Honor--

Q (by Mr. Smith) --what is your opinion of that?

THE COURT: It certainly assumes a fact not in evidence, and the objection is sustained.

MR. SMITH: May I supply the fact to the witness, who is an expert and can testify regarding a hypothetical matter?

THE COURT: Oh, certainly.

Q (by Mr. Smith) Would you answer the question on that basis, please?

THE COURT: In other words, if Mr. Hedger had just decided he wanted--didn't want to go through with the depositions. Is that your question?

MR. SMITH: Yes, Your Honor.

A If Mr. Hedger merely decided he didn't want to go through with the deposition, I'm not sure that that would necessarily violate the scheduling order, but I think it would certainly be proper for an appropriate motion to compel the discovery.

Q (by Mr. Smith) Have you reviewed the document request that was the basis of the motion for protective order?

A Yes.

Q Have you reviewed the documents themselves?

A No, I have not.

Q Can you tell from looking at that document request whether those documents requested included confidential information?

MR. HEDGER: If the witness knows, Your Honor. A I can't--I can tell you, Mr. Smith, I have not examined the documents. I can tell you from my experience in my opinion that many of the documents that you requested I would consider to be confidential documents.

Q (by Mr. Smith) Without looking at the documents? A I-- personnel files, medical records, some of the documentation that you requested on--

Q All of the documents in those particular files you're mentioning are confidential; is that your testimony?

A I don't know what all documents are contained in them. I am saying from my perspective--

Q From those categories of documents that have been mentioned, you can tell that those documents are or are not confidential information?

A I would take the position that medical files, personnel files are confidential information, yes.

Q All of those documents; is that correct?

A Well, I don't know what all documents are included in there, but as a generic category, I would say that personnel files, medical records, those types of information where employees have some expectation that those documents will be held in confidence by the employer, that those documents are confidential.

Q Does a person making a motion for a protective order have any obligation to come forward with those documents to show the Court that those documents are in fact confidential, or is that just something the

Court's supposed to guess at? A Well, I think in my experience, Mr. Smith, most courts are well aware generically of what types of documents are kept in personnel files. Certainly most courts are well aware of the expectation of privacy, and unless there is some personnel policy or other notice to employees that their files and personal documents will not be kept confidential, I think there is a presumption of confidentiality.

THE COURT: Let me ask you a related question, Mr. Siebert. In your experience, do you frequently encounter attorneys on the other side who refuse to sign confidentiality orders?

THE WITNESS: Again, it's usually a matter of negotiation, 90 per cent of the time. There are some clients that our firm represents that are involved in a lot of government work. In those kinds of cases, Your Honor, we seek and usually are successful in obtaining extremely broad confidentiality orders in those types of cases. I don't recall any case where I have requested a confidentiality order where the other side has not complied. Now, not to mislead the Court, that may not be what--the document that gets executed may not be the original draft I sent, but there is certainly some negotiation involved.

THE COURT: But it's usually negotiated between counsel?

THE WITNESS: Absolutely.

THE COURT: All right. Mr. Smith?

Q (by Mr. Smith) Aside from the negotiations, what are the rules about requiring an opposing party to sign a confidentiality agreement? Is there any such rule?

A My practice has always been, Mr. Smith, that I seek to work that out with opposing counsel.

Q No, I understand that. You just testified to that.

A And absent some agreement, then I will ask the court to impose a confidentiality order.

Q On what basis?

A On what basis?

Q Yes. On the basis, I assume, that the information is confidential; correct?

A Yes.

Q Does that obligate--

THE COURT: All right, Mr. Smith, your ten minutes is up. Have a seat.

Any redirect?

MR. HEDGER: Just very short, Your Honor.

REDIRECT EXAMINATION

BY MR. HEDGER:

Q Mr. Siebert, you were asked as to whether or not you could opine on the confidentiality of the documents that are at issue in this case, and you indicated in your testimony your experience being personnel files, medical records being confidential. My question, sir, is what, in your experience, has been your posture in Title 7 litigation when a request is being made to a client of yours for all information concerning affirmative action plans and underlying EEO-1 data?

A The first thing that I always look at is how broad is the scope. Obviously, many of the clients that our firm represent operate on a national basis, so the geographic scope becomes an important issue as to how far flung it is, and that often is dependent upon the actual issues involved in the case. With respect to the other types of documents you mentioned, obviously every case has certain requests that come forward, but generally affirmative action plans, EEO information, OSHA-200 reports, personnel files, medical records, those types of requests where the information is sensitive, where the information is not that which you care to have broadcast to the world, again, those are the types of items or categories of requested documents for which confidentiality orders are normally sought.

MR. HEDGER: No further questions, Your Honor.

THE COURT: Do you have any experience with OSHA?

THE WITNESS: Yes, Your Honor.

THE COURT: Is there sensitivity with respect to OSHA information?

THE WITNESS: Some of the reports--several years ago, OSHA changed their inspection rules, and unless--there's a log that must be kept of all lost time injuries that's required by OSHA. There is--then inspections are conducted based on the fact that your lost time injury ratio exceeds a certain amount. They're really almost tantamount to workers comp. files because they involve on the job injuries. That's primarily what OSHA is concerned with, is safety in the work place. So it's on the job injuries, the causes for those, what type of actions have been taken to prevent those, those types of inquiries. And, again, depending on the case, Your Honor, obviously if it's an OSHA case, the OSHA records become more important than if it's a workers comp. case. Even that might be marginally acceptable in terms of trying to find out other employees who were injured on the same basis. But normally you can narrow or tailor down responses, again, based on conference with opposing counsel to provide that information in some form other than the actual documents that are requested.

THE COURT: All right, you may step down.

Mr. Hedger, do you have any other witnesses? And it sounds as though, for purposes of authentication, you may have to take the stand yourself. I don't know whether you want Exhibit A and Exhibit B admitted, but they are not admitted at this point, nor do I know exactly what they are. I know that they form part of the basis for Mr. Siebert's opinion.

MR. HEDGER: May I ask the--make an inquiry of the Court? If I do take the stand, what does that do in terms of my representation of the defendants in this matter?

THE COURT: Well, we're at an awkward situation, and I have never encountered this before where the attorney on the other side refuses to stipulate to the records. And if he refuses to stipulate, I can't admit those records over his objection. In terms of what it does to your representation of the defendants, I don't think you have to withdraw from representation just because you're testifying on a matter of authentication. I think the code of conduct that governs attorneys in this court is fairly clear on that, nor do I think you're waiving any privilege.

MR. HEDGER: I'll be sworn and will authenticate the documents, Your Honor.

THE COURT: All right.

CECIL R. HEDGER

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, and please spell your last name.

THE WITNESS: Cecil R. Hedger, H-e-d-g-e-r.

THE COURT: Mr. Hedger, I'm just going to allow you to testify in narrative fashion as though you were asking yourself questions. I don't see any other way to proceed.

THE WITNESS: Your Honor, Exhibit--Defendants's Exhibit A is a photocopy of a computer run maintained by the accounting department of Harding and Ogborn for the Louisiana-Pacific Corporation engagement entitled Geana J. Dunkin versus Louisiana-Pacific Corporation. It reflects daily time entries by not only myself with the initials CRH, but also other professional timekeepers within Harding and Ogborn performing services and recording time to the engagement Geana Dunkin versus Louisiana-Pacific Corporation.

It is a photocopy, Your Honor, of the time entry commencing on June 17, 1992 with respect to the first--well, the three telephone conferences that I had--Cecil Hedger had with Mr. Smith where we were informed that both Mr. Smith and his client would

refuse to sign the confidentiality--protective order and confidentiality agreement.

Thereafter, it sets forth time entries with respect to myself and other professionals who are recording time to the engagement with respect to communications with clients concerning the situation, research with respect to being able to establish the necessity and the appropriateness of the protective order.

My testimony with respect to Exhibit A, Your Honor, is equally applicable to Exhibit B, Exhibit B being the computer--a photocopy of the computer entries of time from July 1, 1992 on the Geana Dunkin versus Louisiana-Pacific engagement through July the 10th.

THE COURT: All right. Cross-examination on the testimony, Mr. Smith?

CROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Hedger, you mentioned that both of these documents are computer runs; correct?

A That is correct.

Q What relationship do these documents have to your Exhibit A that you have submitted attached to your affidavit that you have filed with the Court in this case?

A May I have a copy of my motion and affidavit?

Q Yes.

THE CLERK: Was it plaintiff's or defendant's?

MR. SMITH: Plaintiff's.

THE COURT: Well, the motion and the affidavit are in the file.

Q (by Mr. Smith) I've handed you, Mr. Hedger, a copy of defendant's motion for approval of attorney's fees with affidavit, and attached to that, as indicated, is your affidavit and attached to that affidavit is Exhibit A. And as the Court has just stated, those are already in the file. A Now I recall your question. Thank you for the courtesy of sharing a copy of the exhibit to my affidavit, Mr. Smith.

If I could draw your attention to Exhibit A of my affidavit, on June 17, 1992, for example, there is a reference of my services with respect to the motion for protective order that was filed I believe on the 19th of June, and two hours are listed on my Exhibit A with respect to that motion.

However, if you look at Defendant's Exhibit A on June 17th, 1992, you'll see that during the course of June 17th, 1992, I recorded nine hours to the Louisiana-Pacific engagement. Not all of the time with respect to that nine hours was spent concerning the preparation, research, conferences and stuff with the--the preparation of that motion for protective order. And the entry--

Q Have you not, in fact--

A Excuse me. I wasn't quite finished, Mr. Smith.

Q All right.

A The entry that appears on Exhibit A to my affidavit is basically a dictation--my dictation of my review of my time records, including the information as it appears on Exhibits A and B.

Q What was your understanding, though, of the Court's order with respect to submitting information on your attorney's fee application? Was it your understanding that that information was supposed to have been submitted by July 13th?

A My understanding was the motion was to be submitted on July 13th; that's correct.

Q And would that include all documentary and evidentiary information that you had to support that motion?

A No.

Q Why not?

THE COURT: Because that's not what the Court requires. Move on.

Q (by Mr. Smith) You have referred in your--either in your motion or your affidavit to this Exhibit A as being a billing statement. Is Exhibit A a billing statement?

A A billing statement in the sense that that's how the--

Q No, I mean a billing statement in the sense of what you send to your clients as a bill.

A No, it's not a billing statement in that sense, no. It's a billing statement for my time for purposes of my motion.

Q Nor is it a contemporaneous record, is it, Mr. Hedger?

A It most certainly is, Mr. Smith.

Q You mean you prepared these entries at the same time that you did the work?

A On counsel table is my calendar book for 1992.

Q Well, I'm sorry, Mr. Hedger, I'm not--

A I fill out time tickets longhand every time I get a phone call and whenever I perform work, and I keep track of it almost simultaneous or immediately thereafter. In fact, when I'm done with this hearing today, I'll go back and fill out a time ticket. I do not and I cannot effectively

practice law if I don't record and describe what's going on at the time that the services are performed for the client. It's not fair to me or my partners and it's not fair to the client.

MR. SMITH: I move to strike, Your Honor; unresponsive.

THE COURT: Denied.

Q (by Mr. Smith) When was Exhibit A to your affidavit prepared?

A On the 13th of June.

Q June?

A Excuse me, 13th of July, I misspoke, 1992.

Q Who prepared the affidavit? I mean, who prepared the Exhibit A?

A I dictated it and my secretary typed it.

Q So you're saying that this--

THE COURT: Mr. Smith, you have a way of prolonging everything about twice as long as it needs to be prolonged. It is crystal clear to me that Mr. Hedger records his time contemporaneously and that he produced Exhibit A on July 13th for the purpose of justifying a figure of some $4,060.00 in attorney's fees, and that he extracted from all of his contemporaneous time records a summary of his own time, put that in Exhibit A and gave that to the Court.

Now, is there something that's unclear about that to you that requires this tortuous cross-examination?

MR. SMITH: Yes, Your Honor.

THE COURT: What is unclear?

MR. SMITH: Your Honor, it's my job at this point to make a record as to whether this was a contemporaneous, meticulous time record for purposes of the Supreme Court cases and the Tenth Circuit case and Rule 105 of the local rules.

THE COURT: Well, he's told you--

MR. SMITH: It is clear to me that not only is this not a contemporaneous time record; this does not tell you anything about the time that was allotted to the specific task performed. And now Mr. Hedger is trying to come in after the fact and cover up the fact that he did not provide this information originally by just saying I have records somewhere that will show this, but he has not presented those to me or to the Court.

THE COURT: Well, he has done so right now with Exhibit A and Exhibit B, as far as I'm concerned.

MR. SMITH: Well--

THE COURT: Are they--is there a motion to admit Exhibit A and Exhibit B?

MR. HEDGER: Yes, Your Honor.

THE COURT: Exhibit A and Exhibit B are received. Those are made from contemporaneous time records. He doesn't have to produce his rough notes. He just doesn't have to do that. I can't think of any court that requires that. All the Court requires is that he keep contemporaneous time records so that we're not in the position years later of going back and reconstructing--attempting to reconstruct time records. That's all that's required. He doesn't have to produce in his original fee application the scraps of paper that he keeps in his pocket.

(Defendant's Exhibits A and B were received in evidence.)

MR. SMITH: May I continue?

THE COURT: Only if you have something that's going to add. I'm not going to permit you to just waste all our time, Mr. Smith.

MR. SMITH: Well--

THE COURT: If you have a line of inquiry that you wish to pursue, I'll permit you to do it. But I'm not going to permit you to go on forever beating this horse to death.

Q (by Mr. Smith) One of the entries made in Exhibit A to your affidavit, Mr. Hedger, the first one is, on June 17th, 1992, you say three separate telephone conferences with David L. Smith re. discovery, and then at the bottom of that sentence, as well as a group of

additional sentences, you give a figure 2.0 hours. How much of that 2.0 hours was spent with three separate telephone conferences with David L. Smith re. discovery and what relevance does that have to these motions for protective order?

A Which question do you want me to answer first?

Q Both.

A Which one first?

Q Either order is fine.

A Approximately, David, an hour and three-tenths, as I recall the length of our telephone conferences, and the relevance of course to the protective order is your flippant remark to me that your client was more interested--her interests go way beyond any monetary recovery in this lawsuit. Your flippant remark to me about your First Amendment rights would be impacted if you signed a confidentiality agreement, and then finally your simple no, we're not going to do it because if we do it, we'll just be doing what you want us to do; that's what the relevance to that time entry is, Mr. Smith.

Q Well, you say that 1.3 of the total of two hours is what those three telephone conferences were composed of; correct?

A That's correct.

Q And you remember this from your memory; correct? 1.3 hours?

A I remember it from--with respect to looking at my original handwritten notes with respect to what was going on that day with Louisiana-Pacific, Mr. Smith.

Q Of what significance was it that plaintiff nor plaintiff's counsel would agree to sign the confidentiality agreement, as far as the protective order is concerned?

A Of what significance is it?

Q Yes, to the protective order--to the motion for protective order.

A I don't understand your question.

Q Was that significant to your deciding to file the motion for protective order?

A That's what prompted it, Mr. Smith.

Q Why did that prompt it?

A It was obvious to not only myself, but also to Mr. Star Kelso, who was present with me when we had those telephone conferences, that you and your client were going to take the information that was going to be provided to you and go public with it.

Q What words were used to that effect?

A "My client's interests go far beyond any monetary recovery in this litigation."

Q Is that an exact quote?

A Yes, it is, David.

Q And you are not presenting your handwritten notes as a part of your submission in this case; is that correct?

A That's correct.

Q And the reason for that is you're claiming privilege?

A Well, not only with respect to Louisiana-Pacific, Mr. Smith, but my time records have information with respect to the entirety of how I spent my time, including other clients.

Q Do you believe that spending 23.2 hours on this motion for protective order was justified?

A More than justified, David.

Q By what?

A If you would have at any time the simple common courtesy to return phone calls and communicate, I wouldn't have had to file some of these protective orders. I am not--

Q Mr. Hedger, isn't it true that I have spoken with you for hours about the discovery in this case? Isn't it true that my client and I begged you for two hours on her deposition to turn over the information

you were supposed to turn over in this case, and you had a deaf ear to this; isn't that correct?

A No.

Q That isn't correct?

A No, it's not.

THE COURT: All right, I said I'd permit cross-examination on the authentication of the documents, which is the only direct. If you wish to call him, you may do so, and then of course he may call you, if you all want to play at that game. I'm going to permit the cross-examination, though, only in the area that he took the stand for.

All right, anything further, Mr. Hedger, that you want to bring up?

MR. SMITH: I would, since this was on the authenticity objection only, I would continue with the objection that this has not been properly authenticated because he has not, you know, tied the computer run-out to his contemporary records that he admits that he has. I don't know why he doesn't introduce them.

THE COURT: Do you know what authenticity is?

MR. SMITH: Yes, I do.

THE COURT: Tell me what authenticity is.

MR. SMITH: That an item is what it purports to be.

THE COURT: Right. Now, why isn't this authentic?

MR. SMITH: This is just someone's typed out reports from another document.

THE COURT: That's what he said. He said this is the billing statement that reflects what he types--or what he writes down, is then transferred to this billing statement. At least that's what I inferred.

MR. SMITH: If this is not being admitted for the truth of the matter, then I have no objection.

THE COURT: No, it is being admitted for the truth of the matter.

MR. SMITH: Well, I say it's not authentic for the truth of the matter that's being shown on--in the typed document.

THE COURT: Now, wait a minute. Wait a minute. You've introduced a new concept into authenticity there, Mr. Smith. You defined it correctly, I thought, as a finding that the document is what it purports to be, and now you're introducing a concept called the truth of the matter. Where did that come from?

MR. SMITH: Well, I suppose technically that would be an additional hearsay objection. But I think it can all be placed under--

THE COURT: So do you have a hearsay objection also?

MR. SMITH: Excuse me?

THE COURT: Do you have a hearsay objection?

MR. SMITH: Well, obviously we're getting transfers of information from notes to computers--

THE COURT: No, no, just answer my question. I'm sorry to interrupt, but do you have a hearsay objection to this?

MR. SMITH: Yes, I do.

THE COURT: All right. In light of that objection, I'll allow you to lay a hearsay foundation if you'd like, Mr. Hedger.

MR. HEDGER: Your Honor, in the normal day to day regular course of business of Harding and Ogborn, professional timekeepers are, by policy, required to maintain daily time records and to submit those daily time records to staff for purposes of having them prepared into the computer system and then input into the computer system. In fact, if a timekeeper does not do that and that policy is not filed, that timekeeper would have his or her compensation withheld. This information is maintained in the normal and regular course of the business of Harding and Ogborn.

THE COURT: All right. Do you still have an objection, Mr. Smith?

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Objection overruled. The exhibits are received. You may step down.

MR. HEDGER: Thank you, Your Honor.

THE COURT: I take it people are here on the 8 o'clock matters. Do we have the folks here in 91 N 2106? What about 92 N 739, is everybody here? All right, I need to get the files and we'll take that up.

(7:55 a.m. - Whereupon, the hearing was recessed.)

(At 8:35 a.m. on July 16, 1992, with counsel for the parties present, the following proceedings were had:)

THE COURT: All right, the Court calls case Number 92 N 243 again, Dunkin versus Louisiana-Pacific Corporation. I guess I somewhat lost track of where we were, but I believe that you had just completed your testimony, Mr. Hedger?

MR. HEDGER: That is correct, Your Honor.

THE COURT: Do you have any other testimony that you wish to present?

MR. HEDGER: No, Your Honor.

THE COURT: All right. I will hear argument on all of the issues then. I think that of course there's the fee application pending; there's also the motion for reconsideration which essentially raises all of

the matters that have been decided previously. So I will permit the parties closing argument, and I want brief closing argument.

Mr. Hedger?

MR. HEDGER: Your Honor, the defendants felt compelled to file the motions for protective order in light of being told flatly that the--neither the plaintiff nor her counsel would sign the protective order, after being told flatly that signing it now and arguing later with an escape clause in it was not acceptable, that the plaintiff's interests go beyond any monetary recovery.

THE COURT: Let me ask you a few questions by way of interruption there, Mr. Hedger.

MR. HEDGER: Yes, Your Honor.

THE COURT: You--did you ever tender to them--I mean to plaintiff or her attorney--a revised stipulated protective order that allowed either party to come back to court in the event that they thought the protective order were over broad and ask the Court to relieve them with respect to a particular document?

MR. HEDGER: I did not. There is some language in the Exhibit A to the June 19th protective order, Your Honor, that does in effect allow for that.

THE COURT: That's what I thought. And that's what confused me.

MR. HEDGER: Well, during the second telephone conversation I had with Mr. Smith on the 17th of June, that--when he was--he made reference that he might want to file a lawsuit against Louisiana-Pacific again or was concerned about some First Amendment rights is where I called back and suggested again that that language about being relieved, and my time entry I think says agree now, argue later, that was discussed. But there is a provision in Exhibit A to the June 19th motion for protective order that allows for being relieved of the duty of confidentiality.

THE COURT: All right. Now, were the documents going to be produced? What was the relationship between the documents that were the subject of the protective order and the depositions? That is to say were you being requested to bring them to the depositions?

MR. HEDGER: Well, during conversations with Mr. Smith, Mr. Smith made several well articulated representations that it was absolutely necessary for him to look at the documents before the depositions, that it's obvious that if he wasn't going to see the documents before the depositions, that it would be necessary to reschedule at least, Your Honor, in terms of Jim Beldin's deposition.

And he made the representation quite clearly to me that we're going to have a double session deposition. Jim Beldin's out of Hayden Lake, Idaho. That is why the request was made to postpone the deposition until it was convenient with--and after the document request.

THE COURT: All right. How did Mr. Beldin's deposition get scheduled? Go through the sequencing of that for me. I notice it was mentioned in the stipulated scheduling and discovery order as being scheduled for June 23rd. Was there ever a formal notice to take his deposition served?

MR. HEDGER: There was a formal notice to take Louisiana-Pacific Corporation's deposition, and a request for an individual to be identified under 30(b)(6). Jim Beldin was the individual who was identified for that.

THE COURT: All right. That is the notice that was served on May 1st, 1992.

MR. HEDGER: That is correct.

THE COURT: And that notice says that the examinee is going to be examined on all information requested in the request for production of documents and the first interrogatories.

MR. HEDGER: That is correct.

THE COURT: All right. So that was the basis for taking Mr. Beldin's deposition on June 23rd. And by virtue of the notice, were you going to produce documents prior to June 23rd?

MR. HEDGER: Yes, Your Honor. In fact, the documents are in my office as we speak and have been for quite some time. Absolutely; that was our intent and that was why the June 23rd date was selected, because we thought by that time the documents would be inspected, those copies that he wanted would be copied and weld get on with the discovery.

THE COURT: All right.

MR. HEDGER: Now, the second motion, Your Honor, with respect to that issue that was filed concerning the Douglas Eddins deposition was filed simply because I was not able to contact Mr. Smith successfully to talk about a voluntary reschedule, with the understanding again at that time that he had not seen the documents and rather than reschedule and what not that deposition, that's why that motion was filed.

THE COURT: Well, now Mr. Beldin's deposition was to be taken in Denver; right?

MR. HEDGER: That is correct.

THE COURT: And was that voluntary on the defendant's part? You were going to bring him from Idaho to Denver?

MR. HEDGER: Absolutely, Your Honor. Before Mr. Beldin was ever served with a summons and complaint, I informed Mr. Smith that we would make Mr. Beldin available here in Denver at no expense to the plaintiff.

THE COURT: All right. Now, answer one more question while I've got you interrupted. What's the status of the interrogatories? That is unclear to me.

MR. HEDGER: Well, Your Honor, there's a screw-up of sorts on my part. I provided copies of those interrogatories to Mr. Smith on the 19th of June of this year. Jim Beldin of course has been in Hayden Lake. We had this discovery dispute going on. The original answers were mailed up to Hayden Lake. They were mailed back. I received them I think in my office finally, because they were--well, sometime in early July. The minute, Your Honor, that I realized that a motion to compel had been served on my office at 4:30 in the afternoon on Tuesday, I faxed over the signature sheet that Jim Beldin had signed. The answers were not changed in any way to what the answers were that were provided to Mr. Beldin--or excuse me--Mr. Smith on June 19th.

THE COURT: When were the answers originally provided?

MR. HEDGER: I don't know. Some of those employees are employees of Louisiana-Pacific corporation and are out of the State of Colorado, some of them have, Your Honor, I submit absolutely no personal knowledge with respect to providing any information that would conceivably lead to any admissible evidence. They are union representatives of some type with the United Mine Workers of America or the carpenters' union and have never been inside the facilities of Louisiana-Pacific at either Kremmling, Walden or Montrose, Colorado, but they're still listed for purposes of discovery.

THE COURT: Well, let me ask you a question about that list of depositions. The plaintiff contends that all of this was agreed to in May in the scheduling and discovery order. Ordinarily I don't sign scheduling and discovery orders like this one because there's no deposition schedule, and this case is exactly why I don't do it I finally, I guess in a moment of weakness, caved in because it had been so difficult to get any type of scheduling and discovery order in this case, and I went ahead and signed it thinking the parties could work it out. of course they didn't work it out.

But the position that the plaintiff is taking is that you agreed evidently to hold open as much time as needed by virtue of the scheduling and discovery order.

Now, what was your understanding of the agreement?

MR. HEDGER: My understanding of the agreement is two-fold, Your Honor. Number one, that Jim Beldin and Doug Eddins would be behind us on or about July the 6th, and that's why the scheduling order says on or about July the 6th.

There is deposition colloquy during the plaintiff's deposition by and between Mr. Smith and myself concerning the fact that we are going to have to adjust and get together with schedules we may have, and identify other people, and we spelled that out in the scheduling order itself. But we talked about the fact that we're going to identify potentially other individuals who would become--may become deponent witnesses and/or trial witnesses, and that we're going to have to work together concerning that.

It was not my understanding at all that on July the 6th, we were going to start taking depositions and go all day long and start on July the 7th, and it was most certainly not my understanding, Your Honor, that I would not have some kind of reasonable notice as to who's going to be going first in terms of being able to prepare for it.

THE COURT: All right. You may continue.

MR. HEDGER: Your Honor, I have nothing further at this time other than just the final argument that I've attempted to be, with respect to my motion for fees, concise and fair in terms of what I reasonably think plaintiff and her counsel have caused my clients to undergo in terms of lawyer time and expense.

Yesterday, I filed with this Court a further response to the motion for reconsideration and sanctions that has an affidavit of Jim Beldin.

THE COURT: I don't have that yet, by the way. I noticed that Mr. Siebert referred to it and I was trying to follow him in what I had. It may not have made it upstairs, depending on what time it was filed yesterday. Do you have it, Mr. Clerk?

THE CLERK: No, I don't, Your Honor.

THE COURT: All right.

MR. HEDGER: Your Honor--

THE COURT: Do you have an extra copy, Mr. Hedger?

MR. HEDGER: Yes, Your Honor. May I approach?

THE COURT: Yes.

Mr. HEDGER: I'd draw the Court's attention to the 1987 Supreme Court decision in the State of Colorado entitled Bowen versus

District Court, County of Adams, which verbatim, Your Honor, adopted the rationale, a lot of the language of the Supreme Court's decision in Seattle Times versus Reenhart that's been cited about free use dissipates in terms of information that's disclosed during discovery. That Supreme Court case in Colorado has been in effect for eight--excuse me--five or so years.

I draw the Court's attention to the affidavit of Jim Beldin attached to the filing yesterday which spells out the confidential nature and how we treat personnel files and how Geana Joy Dunkin, as personnel manager, is well aware of the fact that personnel files are confidential.

As an exhibit to that affidavit is a copy out of the Louisiana-Pacific's corporate policies book concerning proprietary confidential information that specifies employment plans and personnel files are confidential.

I don't understand plaintiff's argument about the material not being confidential. I think they're specious and not well founded. They're not supported by any citation of legal authority.

I do not understand how the plaintiff with a straight face, or her counsel with a straight face, can file a motion seeking sanctions against me over unspecified questions that I was supposed to

have asked in a deposition over two months ago where I do not recall, Your Honor, any objection whatsoever being made in terms of improper question, abusive type of questions or invasive, humiliating or any other type of question right now, and I can't--it's simply impossible to come forward and respond to this.

My clients and myself have been forced to respond to what I think, and if I can quote Barbara Jordan's comments a few days ago, that is absurd and almost, Your Honor, contemptuous of this Court's order.

On July the 9th, plaintiff's counsel filed a request for discovery, for Court approval of discovery, in effect apparently seeking the magistrate to circumvent this Court's ruling on July the 9th. This Court ordered that the new Rule 30.1(a) would be in place for scheduling depositions, that I would be conferred with, and the magistrate would have to approve it subject to Mr. Smith establishing the need and why some other means less costly could not work. The July 9th filing, Your Honor, does not have any reference at all to the Court's--or the July 10th filing, I'm not sure what date it is, but to this Court's order last week.

We are being forced to continually respond and, again, to absurd and contemptuous type of conduct on the part of the plaintiff and her counsel.

Finally, Your Honor, as I represented to this Court a minute ago, I have not spoken with Mr. Smith since July 17th. At no time prior to his filing his motion to compel with respect to the issue on the interrogatories, and I frankly apologize to the Court and I apologize to Mr. Smith, I spaced it and I was late, but at no time did I get a phone call, a letter, Hedger, where are the answers to interrogatories, I need them.

When I supplied the answers to those interrogatories, Your Honor, I told Mr. Smith in the covering correspondence that answers would be provided to him before any depositions were taken so he would not be prejudiced. I was not contacted in any way, as represented by Mr. Smith in his certificate of compliance, concerning the motion to compel.

For all the foregoing reasons, Your Honor, we respectfully request our fees for last week and our fees for this morning. I'm authorized to inform the Court that during the recess, Mr. Siebert has agreed and I have agreed to 2.5 hours of his time up to--up until

6:00 a.m. this morning and for his time in the courtroom thereafter as a witness, and request fees up to this point.

THE COURT: All right. And what amount of time are you requesting? Just for the time here this morning at 175 an hour?

MR. HEDGER: Yes, Your Honor. I will not concern myself with any preparation time yesterday and what not.

THE COURT: All right. Mr. Smith?

MR. HEDGER: Thank you, Your Honor.

MR. SMITH: Your Honor, my starting place has to be with the motion for reconsideration. Along with that motion, I filed a motion to compel and for sanctions relating to the interrogatories and a certificate of compliance with Local Rule 403(g).

THE COURT: Tell me about the certificate of compliance. Did you talk to Mr. Hedger before you filed that?

MR. SMITH: Your Honor, back before the depositions in this case--

THE COURT: No, no. No, no, no. Not have you ever talked to Mr. Hedger.

MR. SMITH: In answer, yes.

THE COURT: The answer to--

MR. SMITH: Is that the answer you--

THE COURT: Did you talk to Mr. Hedger about the motion to compel prior to filing the motion, that is to say between July 1st of 1992 and today?

MR. SMITH: Between July 1 and--what was the event on July 1? I can't remember, Your Honor.

THE COURT: I picked July 1.

MR. SMITH: Oh, you just picked that? Between July 1 and today, I doubt that we discussed the interrogatories specifically.

THE COURT: Well, then how could you have complied with Rule 403?

MR. SMITH: Because we have discussed this in reference to my filing a motion to compel all the way from the beginning when Mr. Hedger wrote me a letter before my client's deposition saying that the answers to interrogatories would be available to us at that deposition, that all of the documents would be available to us at the deposition. Because, you see, these items don't only go to the discovery that the defendants want to do; the plaintiff would like a little bit of discovery too. We would like to know what position that the defendants take on some of these issues before my client's deposition has to be taken, and before that was done, we had extensive discussions

that the answers to the interrogatories and all of the documents would be turned over to us at that time.

When we got to the deposition, Mr. Hedger promptly reneged and said no, I'm not giving you anything. My client had to take her deposition without any--have her deposition taken without any preparation in terms of knowing what position the defendants were going to take, what the documents were, because she needed to refresh her recollection on some of that information.

THE COURT: Well, when were the documents--

MR. SMITH: Subsequent to that time--

THE COURT: When were the documents served?

MR. SMITH: April 30.

THE COURT: The document request?

MR. SMITH: The request?

THE COURT: The request was served when?

MR. SMITH: April 30.

THE COURT: Well, then it wasn't due till May 30th.

MR. SMITH: It wasn't due except through his representations at that time. And at that time, I advised Mr. Hedger that, okay, since you are reneging on your promises and we came here in good faith relying on your promise, we are going to expect the documentation and

the answers to the interrogatories exactly when they are due. I believe the answers to interrogatories were due June 2nd, the documents were due June 4th. When that did not happen, we again had extensive discussions about it, and he just put me off.

THE COURT: Did you get an unanswered--I'm sorry--an unsigned set of interrogatory answers on June 19th?

MR. SMITH: Did I receive a set--a signed set at that time?

THE COURT: An unsigned set.

MR. SMITH: An unsigned set. I received a document entitled Defendants Answers to Plaintiff's Interrogatories.

THE COURT: Unsigned?

MR. SMITH: Unsigned.

THE COURT: All right. So did you call him up and say I've got the unsigned responses, now when are the signed responses going to come?

MR. SMITH: No, Your Honor, I did not. In his letter, Mr. Hedger said, "I realize these responses are unsigned," saying to me he realized they really were not answers to the interrogatories, that he would send over the answers the following Monday. He did not do that.

THE COURT: So before you filed your motion, did you say, look, I want those by such and such a day, and if you don't give them to me, I'm going to file a motion to compel?

MR. SMITH: Yes, I did say that.

THE COURT: You did say that?

MR. SMITH: Yes.

THE COURT: When did you say that?

MR. SMITH: Back when the deposition was taken. THE COURT: Back when the deposition was taken? MR. SMITH: Yes.

THE COURT: No, no, that doesn't make it. That doesn't make it.

MR. SMITH: Well, Your Honor, the rule says that there has to be conference about the motion to compel. We had plenty of conferences.

THE COURT: It doesn't mean you can mention it way back here and then come to court when you could have solved the problem by saying, look, I'm going to go to court if I don't get a signed copy.

MR. SMITH: Your Honor, this trick is played by every defense counsel in every one of these cases that I have ever been involved in, and what it comes down to is they play the game of pushing it out further into the future so that you never get your answers.

THE COURT: Well, you've got answers--

MR. SMITH: And you have to eventually file a motion to compel, and then when you file a motion to compel, they say, oh, excuse me, I forgot about that, and send it in and moot it out. This is a trick that is played over and over and over, and this is what Mr. Hedger was doing here also. And there's no doubt about it. Yes, I did confer with Mr. Hedger over and over about the interrogatories and about the documents before I filed the motion to compel.

Now, I did not, in answer to your question did I confer with him between July 1 and July 17th, probably not, probably not after June 17.

THE COURT: Why not?

MR. SMITH: Why? Mr. Hedger had broken every one of our promises relating to this case. He had promised--

THE COURT: Well, you know, for one--for starters--

MR. SMITH: --to turnover the--you asked me.

THE COURT: Mr. Smith, for starters, the local rule of this Court says that the Court is not bound by agreements among counsel concerning discovery. And this situation is exactly why the rule exists.

MR. SMITH: We have an order in effect, Judge.

THE COURT: Is that the private agreements among counsel, I can't enforce because it always comes down to your word against his. And so all I can do is enforce what's in writing and what the Court has previously ordered.

MR. SMITH: And the Court had previously given us a stipulated scheduling and discovery order. And, of course, objectively that is what this is all about. You know, the motion for reconsideration can be broken down I guess substantively into the motions that are directed toward the documents and those that are directed toward the depositions. The interrogatories fall outside of this, and the only issue is the one raised by Mr. Hedger on that as to whether there was conference before the motion was filed. There was conference; not immediately before, however, I admit.

As far as the motion for protective order is concerned, those directed toward the depositions, we have the motions that are directed toward the defendants' depositions and we have the motion--the ones that are directed toward the non-party witness depositions.

It's my understanding that the only thing that this Court has entered those relating to sanctions regarding are the latter, that is, the non-party witnesses. But that does not mean that there's still not substantive issues relating to the depositions going to the defendants.

And with respect to those motions, those going to the defendants, it's clear that we had a stipulated order in effect that the depositions would be taken at a certain time. Yes, deposition notices were also sent out confirming that the depositions would in fact be taken at the time that counsel and the Court had agreed.

And as far as this statement by Mr. Hedger that Mr. Beldin voluntarily agreed to appear, I never noticed Mr. Beldin's deposition. The deposition that was noticed was the deposition of Louisiana-Pacific Corporation, and Mr. Hedger said that Mr. Beldin was going to be the company representative. So that's not a voluntary situation. That's a situation where he was required to attend.

I don't know what point he is making by indicating that Mr. Beldin was doing this out of the goodness of his heart or something, but it was a situation where a deposition notice had been sent out and we had an order by the Court that the company's deposition was going to be taken and Mr. Hedger said I am sending Mr. Beldin.

As far as whether the documents had anything to do with whether those depositions would be taken or not, yes, I told Mr. Hedger that I thought the best way to take the depositions of the defendants, just as for him to take the deposition of the plaintiff, was to

have all of the documents produced first. I told him that was the only rational way to approach this. We discussed this when we were before the Court prior to the time that the stipulated order was entered into. But Mr. Hedger refused to turn over the documentation, and he said, "Don't you need an extension of time then to take the depositions?" I said, "No, there is much more that I'm going into with these witnesses other than just introducing the documents into the record."

THE COURT: Well, did you tell him that you would have to split the depositions, that you would take the depositions and then you'd do them again as soon as you--

MR. SMITH: I said that I needed to take the depositions and that there was much more that I needed to go into in those depositions other than introducing the documents, and that it may very well be that if I cannot get all the information, if he does not bring the documents, that I will have to continue the depositions so that we can introduce the documents. I had reminded him that we had a stipulated order in effect and that we had stipulated that these depositions were going to be taken at the time that that said, and he said that didn't make him any difference, that he was not going to go forward with the deposition even though we had agreed to it. That was with respect to the defendants.

With respect to the 30 plus other non-party witnesses, Mr. Hedger also agreed to those depositions exactly in the form that I noticed them. As I have stated in my motion for reconsideration, that was the basis of sending out the notice of depositions, just confirmatory precisely of what we had agreed to in the order. And for Mr. Hedger to stand up here and say that he is surprised that we were having those depositions is ridiculous.

We did only agree on a date to commence those depositions, and we agreed on a time at 9 o'clock in the morning. Yes, we agreed that there was to be flexibility in the scheduling after that. Nothing in the deposition notice indicates otherwise. The deposition notice says that those depositions will be taken during reasonable times after they are commenced on July 6th. This wording is exactly the wording that was in the order.

How we can now have an order saying that it was proper for Mr. Hedger to submit motions for protective orders going to depositions that he himself agreed to is beyond me. What, on the technicality that a deposition notice is not supposed to be sent out without conferring with opposing counsel? Well, in the first place, as we discussed last time, that is not even the rule for this case. We're still operating under the old rules. There's no actual legal requirement

under the rules of procedure that a deposition notice be discussed with opposing counsel before a deposition notice is sent out.

So it is beyond me what we are arguing about here. the motion for protective orders with respect to all of those depositions appear to me to be totally bogus. We were only doing what the scheduling order required us to do.

THE COURT: Let me interrupt you there.

MR. SMITH: Yes.

THE COURT: This is just really more than I can take. In Paragraph 4 of ii of the scheduling and discovery order, you indicate an intent to take "all employees who applied for or received disability wages at any time during the period January 1, 1988 to the present." And in the next paragraph, you announce an intent to take all persons who participated in the decision to discontinue plaintiff's disability wages on or about April 1, 1992.

Now, what did you think you were going to do? Were you just going to plow through these, and how were you going to know those people?

MR. SMITH: Your Honor, if you will check, those would have been in the answers to the interrogatories had Mr. Hedger supplied those. And it should be noted that Mr. Hedger agreed to this also. We

agreed we didn't know the names of all of the people. I assumed that he had not sat down and done a detailed enough interview with his client to know who all of these people were. We were remaining flexible, but that was a category of depositions that we needed to take because that is absolutely critical to my case. I have no other way to get that information except from the defendants.

Now, Mr. Hedger won't answer my interrogatories, he won't give me the documents, he filed motions for protective orders for the defendants' depositions. Well, let's try the non-party witnesses. Well, he doesn't want me to depose them either. Now, what discovery is it that I'm allowed to do in this case, by the way?

THE COURT: I'll tell you in a few minutes.

MR. SMITH: Well, I'm talking from Mr. Hedger's standpoint. I mean, he has filed motions--he has completely stopped my discovery on this--in this case based on what, that I didn't confer with him for--before I noticed a deposition that we had already agreed to? How ridiculous.

THE COURT: Sir, he didn't stop your discovery.

MR. SMITH: He has stopped my discovery, Judge.

THE COURT: He indicated that all of the documents, every one of those documents would be produced subject to a confidentiality order.

MR. SMITH: I am not required to sign a confidentiality order when there is not confidential information involved. And when the expert witness testified today, he didn't give any citations to authority showing that any documents that Mr. Hedger was asking for were confidential. Mr. Hedger has not cited any authority. He has not--

THE COURT: Well, he certainly has.

MR. SMITH: --presented any documents to the Court.

THE COURT: He certainly has.

MR. SMITH: What authority?

THE COURT: Do you read what he submits?

MR. SMITH: You mean Seattle Times versus--

THE COURT: He submitted authorities in his papers.

Mr. SMITH: Your Honor, that issue cannot be determined without seeing the documents that Mr. Hedger is claiming are confidential. Not everything in a personnel file or in a medical record can be claimed to be confidential.

THE COURT: so is it your position that I'm going to have to go through document by document every personnel file?

MR. SMITH: No, Your Honor. My position is that any document that Mr. Hedger thinks is confidential should be submitted to someone. I don't think that all those documents are confidential. The number of documents that would be confidential in that documentation, as I told you last time, 99.99 per cent of it would not be confidential. I know Mr. Hedger in the latest submission--

THE COURT: Have you got any basis for that statement?

MR. SMITH: No, I don't because I don't have the documents either. That was Mr. Hedger's burden. That's what he takes on when he files a motion for a protective order, to provide the Court with the information to make the decision. He has not done that. That's why I said last time I had no idea whether there is confidential information in those files or not. I don't. How would I know? These are categories of documents. I don't know. But we get a blanket order in this case, Judge, that just says everything is confidential. That can I t be.

THE COURT: Well, it didn't quite do that, did it?

MR. SMITH: Well, I'm not sure.

THE COURT: Did you read the order? Did you read the order?

MR. SMITH: You mean the one that Mr. Hedger wanted me to sign?

THE COURT: Yes. Did you read it?

MR. SMITH: Yes, I did.

THE COURT: Well, what do you make of this paragraph of the order. "If and to the extent the plaintiff believes that any documents have been improperly labeled as confidential and wishes to disclose such documents outside the terms of this order, the plaintiff shall provide the defendants with reasonable notice of her intent to disclose the documents. If the parties cannot resolve their disagreement with respect to the disclosure of any document designated as confidential or the propriety of such designation of any document, the parties shall jointly petition the Court for a determination of these issues."

Now, why wouldn't that have allowed you to go ahead with your discovery, and if you thought that there had been too broad a designation, you could come to the Court at that point and say this document is not confidential, this one isn't, this is?

MR. SMITH: Your Honor, that places on the plaintiff a burden that I don't think goes on the person who is asking for the documentation. He is saying everything is confidential. It's his burden to show a Court that that documentation is confidential. With these broad kind of confidentiality orders--

THE COURT: What do you want to do with these documents?

MR. SMITH: Excuse me?

THE COURT: What do you want to do with these documents?

MR. SMITH: We're going to use them for discovery in the case. But what I don't want is--

THE COURT: Well, let me--

MR. SMITH: --two years from now when I sue Louisiana-Pacific corporation again, if that happens, I don't want to be worried that some language in a confidentiality order two years ago prevents me from doing something I need to do in the present case. I already have that situation right now. I'm not signing off on confidentiality documents unless I know there is confidential information in those documents.

THE COURT: Well, I'll enter an order that you don't have to sign off--

MR. SMITH: Well, if I'm ordered to do it, I will do whatever I have to do. But I'm saying I'm not voluntarily signing those documents.

THE COURT: All right.

MR. SMITH: Without me even knowing what the documents are? How--why would I? Sometime two years from now, Mr. Hedger might pull out a document and say, oh, we thought this document was

confidential, now pay the liquidated damages provisions in the confidentiality order. I've got one of those right now--

THE COURT: There's no liquidated--

MR. SMITH: --that I have to debate as to whether--

THE COURT: Sir--

MR. SMITH: Excuse me?

THE COURT: Sir, there is no liquidated damages provision in this--

MR. SMITH: Well, there is in another one.

THE COURT: Well, we're talking about this one.

MR. SMITH: Judge--

THE COURT: There is no liquidated damages provision in this confidentiality order.

MR. SMITH: This does--

THE COURT: Now, deal with this one, sir.

MR. SMITH: All right. This stifles my freedom of speech and my client's also. We don't know what documents are being ordered not to discuss based on that confidentiality order, and it places upon us a burdensome procedure to get that determined, and I don't think that we want to take on that burdensome procedure. If Mr. Hedger thinks that he has confidential documents, he should turn them over to the Court

and let the Court make that determination. And that's the second group of--or some of the motions for protective orders, at least two of them, go to the documents. But there hasn't been any good cause, i.e. there has not been any proof that there is any confidential information involved.

THE COURT: You know, one of the things you asked for is medical records of other employees.

MR. SMITH: Yes.

THE COURT: Do you think there might be some confidentiality involved there?

MR. SMITH: There's--it's possible that there might be. I'm not sure of what--

THE COURT: Is it more than possible? I mean, don't--

MR. SMITH: No, not really.

THE COURT: --employees have an expectation of privacy in their medical records?

MR. SMITH: No, the case that we've been talking about, the Reenhart case, does not give any definition of confidential information. It just says if there is confidential information, the party does not have the right to turn it over outside of a legal proceeding.

THE COURT: All right, have a seat. I've got a question from a jury.

MR. HEDGER: Do you want counsel to--

THE COURT: Well, you'd better have a seat in the back row so the jury doesn't wonder what's going on.

(9:15 a.m. - Whereupon, the hearing was recessed.)

(At 9:18 a.m. on July 16, 1992, with counsel for the parties present, the following proceedings were had:)

THE COURT: Case 92 N 243, Dunkin versus Louisiana-Pacific. All right, Mr. Smith?

MR. SMITH: So based on the lack of good cause, I don't believe there was any basis for filing a motion for protective orders. So that gets me I guess to the motion for--I mean, the order for sanctions.

As I understand it, the Court only granted the order for sanctions relating to the deposition notice for the 30-odd witnesses.

THE COURT: No, that's not true. That's not true. That's not true.

MR. SMITH: Well, that was my understanding--

THE COURT: We discussed the confidentiality order, we discussed issues of confidentiality last Thursday. I told you what my understanding of confidentiality was, and I did not expect that when you

walked out of this courtroom last Thursday, you would go compose a document request and a set of deposition requests to the magistrate that would ask him to do what I'd already told you you could not do.

MR. SMITH: Judge, my understanding of that order, and as you know there is no written order, or none that I'm aware of, none that I have received, my understanding of the order was that for my client to get any discovery in this case, that the requests for discovery had to be submitted to a United States Magistrate.

Now, how am I supposed to do that except making a motion for the magistrate to please approve these requests? That's exactly what I did.

THE COURT: I had already told you, sir, that the document requests were not going to be granted unless some kind of protective order were entered. And I thought I clearly indicated to you that you ought to be conferring with Mr. Hedger regarding the scope of a confidentiality order.

MR. SMITH: Your Honor, I thought that the Court had already ordered a protective order be entered.

THE COURT: Well, no protective order has been entered.

MR. SMITH: Well, Your Honor, I don't--

THE COURT: Then why are you going to the magistrate and asking for the very documents that I said you could only get before--under a protective order?

MR. SMITH: Well, both counsel are confused on that issue then because I know that both of us have made representations in pleadings that we understood that your order was that the protective orders that Mr. Hedger has asked for, whatever that is, are granted and that in order for plaintiff's counsel, but not defendants' counsel apparently, to get any discovery in this case, that those discovery requests would have to go through a magistrate. And the intent of my motion was to do exactly like that. I believe it's a completely burdensome procedure, Your Honor. Every time I want to take a deposition, I have to make a motion to the magistrate? I don't see how that is--

THE COURT: Well, you brought it on yourself.

MR. SMITH: Well, that's what I'm discussing with you now, Judge. I don't see the basis for the motions for protective order. And so that gets to the motion for sanctions. All that I could understand from your verbal order the other day regarding the motion for sanctions was that you were saying that I should have conferred with opposing counsel

before noticing depositions that had already been stipulated to, and we had discussed that that local rule was not even in effect in this case.

But if that's the case, why did I have to discuss anything? I did. I discussed it before we did the stipulated order. It took us a long time. I can show you the drafts of the order that went back and forth and back and forth and back and forth before we came to this understanding that we would take all of these people's depositions. so we discussed this extensively. I did comply with even the new rule. But to impose sanctions because I didn't comply with a rule that was not in existence at that time, I just did not understand that and I did not understand why I had to go through a magistrate, and that ruling seemed to be based on the same type reasoning, that I did not confer.

Judge, I have conferred with Mr. Hedger more than you would believe. Mr. Hedger is working on an hourly rate. If he confers, he charges his client. I can't confer all the time that Mr. Hedger wants to confer. If I did that, I would do nothing but confer with Mr. Hedger. We have these things worked out in a stipulated order. I don't know why we couldn't follow it. That's what I was trying to do.

THE COURT: All right, are you done?

MR. SMITH: I think I have made the technical points that I want to make on the request for attorney's fees. obviously they are not

contemporaneous records. I don't believe that it has been shown that 23.2 hours should have been spent on these motions, especially when they were questionable to have filed in the first place.

I must admit that I have been caught by surprise on this. My understanding of the Court's July 9th order was that all of Mr. Hedger's evidence was supposed to be in by the 13th so that I would have an opportunity to respond. What we get is a hearing today of an expert witness that I have had no hope of responding to or presenting rebuttal evidence to. I see that Mr. Hedger has--

THE COURT: No, that was what the hearing today was about. You could present rebuttal evidence.

MR. SMITH: Your Honor, all I got from counsel was his own affidavit, and that affidavit, as I have pointed out, is insufficient and I made a response--

THE COURT: You could have presented rebuttal evidence.

MR. SMITH: Excuse me?

THE COURT: You could have presented rebuttal evidence.

MR. SMITH: I presented my rebuttal in my response to his motion.

THE COURT: Well, fine. You don't have any evidence aside from that.

MR. SMITH: Well, I might have had evidence if I'd had an affidavit of an expert that I could have rebutted.

THE COURT: Well, that's the purpose of a hearing. We hold these hearings so that the parties can produce evidence.

MR. SMITH: Well, I was under the impression that what--that the hearing was going to be limited to what Mr. Hedger presented originally and what I responded to.

THE COURT: All right. Anything further?

MR. SMITH: And I would say on that point that the affidavit that he has submitted is obviously meant to cover his tracks on the good cause question. I would move to strike that affidavit because it was submitted late and I don't think that it goes to facts and certainly doesn't show that there was confidential information.

THE COURT: Now, wait a minute. The affidavit was submitted late?

MR. SMITH: Was submitted yesterday. There is a rule in your order--

THE COURT: Now, wait a minute. Which affidavit are you talking about? The affidavit of Cecil R. Hedger filed July 13th?

MR. SMITH: No, the affidavit of James Beldin. Mr. Hedger did submit his affidavit in compliance with your order, although I did

not receive it, it was not hand delivered to my office until the 14th of July. I assume that he filed it here on the 13th. But on the 15th, he filed another affidavit, that is the affidavit of James Beldin, going to--it appears that he's worried that he hasn't shown good cause, and he's trying to use that affidavit to in some way bolster the case that the documents he asked for are in fact confidential information. And as I said, I didn't get this until yesterday. I consider that to be late. I don't consider that to be actual factual information that this is confidential information.

THE COURT: Anything further, Mr. Hedger?

MR. HEDGER: No, Your Honor.

THE COURT: All right, I am going to make some findings here concerning the background of this case and what leads us to this stage in the litigation, and I am imposing sanctions, I am going to grant the award of fees and I'm going to grant them against counsel personally.

The complaint in this case was filed on February 7th, 1992. The case immediately--almost immediately began to create management headaches for this Court because of plaintiff's counsel's behavior.

On April 14th, 1992, in a routine check of the file, my staff discovered that some of the defendants had not been served. I, therefore, issued a routine order to show cause why the complaint against James Beldin and Dan Dilworth should not be dismissed for failure to prosecute.

Instead of promptly serving Mr. Beldin and Mr. Dilworth, the plaintiff's counsel responded with a verified response to the order to show cause on April 21st that says, number one, we've been trying to serve Mr. Dilworth and Mr. Beldin, but we haven't been able to serve them, and so we request four additional months beyond the 120 days permitted by Rule 4(j), meaning that the plaintiff was requesting until August 21st, 1992 to serve process on these additional defendants.

As I later found, the plaintiff did not explain what efforts she was making to serve Mr. Beldin. She did not explain what efforts she was making to serve Mr. Dilworth. She did not indicate that they were avoiding service, either one of them. She did not indicate anything that would indicate to the Court that she was diligently pursuing the case. And, indeed, she proposed to extend the time within which she could make service until a date far beyond the date that had already been set for several conferences by this Court.

Upon consideration of that response, I entered an order requiring that the plaintiff proceed and finding that her request for an additional 120 days beyond the time already permitted by Rule 4(j) is wholly unsupported by the required showing of good cause. And I, therefore, ordered her to serve James Beldin and Dan Dilworth and file written proof of service with this Court no later than Tuesday, May 26, 1992.

Thereafter, I understand Mr. Hedger agreed to accept service on behalf of Mr. Beldin. Mr. Dilworth was never served, and I later dismissed the case against Mr. Dilworth. Now, that's where matters stood as of about eh end of April, 1992, and I had already spent a significant amount of my time and a significant amount of staff time on this case because of plaintiff's counsel's incomprehensible refusal to proceed forthwith with the case and to get the defendants served.

Mr. Beldin answered, the scheduling and discovery order was entered, and I might add that that was a headache also, an unusual headache in this case because the discovery and scheduling conference was originally scheduled for May 6th. Under the hearing, conference and trial procedures that I follow, the proposed order was due for my review the week before, which would have been roughly April 27th, 1992. No order was submitted.

On May 4th, I finally got an order from Mr. Hedger under cover of a letter dated May 4th that recites Mr. Smith's intents and vigorous objection to Louisiana-Pacific Corporation's and Douglas Eddins' notice of plaintiff's deposition to commence on May 14th, 1992.

That matter was taken up at the discovery and scheduling conference. Mr. Smith took the position that there was some kind of custom that permitted him to put off the plaintiff's deposition until after certain defense depositions had been taken. I ordered at the discovery scheduling conference that plaintiff and counsel, having been properly noticed to appear for a deposition, would appear for her deposition as scheduled. And I further ordered that documents are to be produced and deadlines are to be set in accordance with the rules, and I ordered that counsel submit or file a joint status report by May 18th on possible settlement talks with the magistrate.

In addition, I ordered that the parties file a new stipulated scheduling and discovery order by May 12th, because what they had submitted then was, under cover of the letter of May 4th, was totally inadequate. Indeed, it was only Louisiana-Pacific Corporation's and Douglas Eddins' proposed scheduling and discovery order, and it contained absolutely no input from the plaintiff, even though, as

Mr. Hedger recites in his letter, which has not been disputed by the plaintiff, input was sought from the plaintiff.

Finally, on May 28th, 1992, I received the stipulated scheduling and discovery order. And I might mention that in between those two times, there was a stipulation submitted on May 22nd, 1992 concerning progress on the order which recited that counsel had been diligently communicating and negotiating a schedule of discovery in this matter involving at this point in excess of 37 identified individuals, et cetera, and it also recites that plaintiff's initial deposition had been taken commencing on May 14th, 1992 and it recites that it would not be appropriate to have the matter referred to a magistrate prior to the status conference.

Now, when I received the stipulated scheduling and discovery order on May 28th, I immediately noticed that it did not comply with what I require of stipulated scheduling and discovery orders, and that is that the parties agree among themselves and among counsel and with the deponents on a definite schedule and date for each deposition.

What the stipulated scheduling and discovery order here did was to say that commencing on about July 6th at 9 o'clock a.m., the following individuals will be deposed, and there are listed some 37 or

38 people. Not all of them are listed by name. Some of them are listed by general category.

At that point, I seriously thought of having counsel in again to start over, and I did not do so primarily because I had already spent more time on this case than on any other routine Title 7 case that I can think of at this point in the litigation. And on the representation that counsel had stipulated to this order, I went ahead and signed the order.

Now, when I signed the order, I did not interpret that order, nor can the order reasonably be interpreted to provide that 37 depositions were going to begin on July 6th, 1992 at 9 o'clock a.m. and continue each and every day until all 37 of those depositions were concluded. And that is what counsel later noticed in the deposition notice and then justifies his position by say well, that was all agreed to in the stipulated scheduling and discovery order.

It is my specific finding that that was not agreed to based on not only Mr. Hedger's representation that that was not agreed to, but my interpretation of the scheduling and discovery order. That does not permit counsel, without further notice, without consultation, without so much as a "by or by" to send out a notice of depositions on

June 30th for depositions to commence on July 1st--or on July 6th, 1992.

After the stipulated scheduling and discovery order, there were some depositions that were set to commence on June 23rd, as I understand it, and at that point, there arose a controversy concerning confidential information.

The notice of deposition that had been sent out on May 1st for Mr. Eddins and for a representative of Louisiana-Pacific Company indicated that inquiry would be held or conducted on all of the information requested in plaintiff's first request for production of documents and all information requested in plaintiff's first interrogatories.

It appears, and I find, based on the representations of both counsel that Mr. Smith understandably wanted to have the documents before the deposition of Mr. Beldin went forward on June 23rd. And I further find that he told Mr. Hedger that if the documents were not presented on June 23rd, that it would be necessary to split the deposition so that the deposition could not be concluded on June 23rd or shortly thereafter. And I further find that Mr. Smith was taking the position at that time that he would not agree to or sign or

consider or negotiate on any kind of a protective order because he took the position that no document that was being requested was confidential.

With respect to the documents that are being requested, I'm going to make some findings. The documents requested are broadly categorized, and it may well be that there are certain selected documents among the documents requested that would not ultimately be determined to be confidential. However, it is also my clear finding that the vast bulk of these documents are proprietary, confidential information.

I make that finding for several reasons. First of all, on a review of the documents, the review of the documents includes personnel files, it includes workmen's compensation files of other employees, it concerns--it requests Colorado Civil Rights Commission files on all complaints, it requests medical records of certain other employees, it requests Equal Opportunity--United States Equal Employment Opportunity Commission files in the possession of the defendant.

Medical records, contrary to what Mr. Smith says, are inherently confidential, particularly medical records of other employees. I don't have to go through each medical file to make a determination that medical records as a broad category are likely to be confidential information. Indeed, it is somewhat surprising to me that Louisiana-

Pacific is willing, without some sort of specific medical waiver by the affected employee, to produce the medical records of the other--of the employee under a confidentiality agreement. However, they are, and so I don't pass on that. Those medical records are undoubtedly confidential, and I don't need to look at them to make that determination.

Personnel files. It is true that there may be documents in personnel files that are not confidential. However, the vast bulk of personnel files, evaluations, criticisms, are regarded by employees as confidential information. They expect a certain level of privacy when they are frankly discussing their job and having their job discussed by their employer. There's no question in my mind that the bulk of personnel files requested are confidential, and I don't need to look at the personnel files to make that determination.

If there's any doubt about the finding of confidentiality, that doubt--or the fact that they're proprietary information--that doubt is resolved by Mr. Beldin's affidavit which has been submitted as Exhibit A to defendant's response to plaintiff's motion for reconsideration and motion to compel.

Now, as I say, it's possible that there are documents requested that are not properly regarded as confidential, and the

question is what should happen in that situation. It seems to me there are two alternatives. Number one, the parties can complain about it and fight about it and argue about it and present the issue to the Court, and the Court can go through a stack of documents and sort them through as this one's confidential and that one's not confidential, and this one is confidential and that one is not confidential, and so forth. If I had to do that in every litigation, I would do nothing but resolve discovery disputes. I wouldn't have time to do everything else.

In my experience, the way--both as a lawyer and as a judge, the way that these issues are resolved is that the parties sit down and negotiate some sort of confidentiality agreement as a means of convenience, as a means of expediency.

Now, that doesn't mean that the plaintiff or the defendant is agreeing that every document that's being produced is confidential. What it means is that the parties are agreeing, for the sake of producing the documents, to abide by a confidentiality order, and that is exactly the kind of confidentiality order that was being proposed here. And Mr. Hedger made it very clear that it was at all times negotiable, the plaintiff could look at it. If there were any changes that the plaintiff wanted to negotiate, it was possible to negotiate those changes.

And most importantly, the confidentiality order here, like many confidentiality orders that I've seen, has a mechanism by which the parties can seek further review. And that mechanism is that if there's any party who feels that a document is not confidential, that party can apply to the Court, present the document and ask the Court for a determination concerning the confidentiality of that document.

Now, that kind of procedure seems particularly appropriate to me here where the categories of documents requested are broad, they include documents that are, on their face, confidential and they may include--they may or may not include some documents that may ultimately not be determined to be confidential. But the orderly procedural way to straighten that out is, certainly in a case where the vast majority of documents on their face are confidential, is for the parties to negotiate, if possible, a confidentiality agreement that protects the interests of both parties and allows the plaintiff to get on with the litigation and allows the defendant to protect its proprietary and confidential information.

In that manner, if there are documents, for example in the personnel file, that are not properly regarded as confidential, the plaintiff, if she perceives herself prejudiced by the confidentiality order, can apply to the Court for relief from the confidentiality order.

Now, what concerns me very much here is the suggestion that's made by the defendant, and really not sufficiently rebutted by the plaintiff, that she's not really interested in the documents for the purposes of this lawsuit. She's interested--and I'm paraphrasing what Mr. Hedger quoted exactly--she's interested in the documents for purposes beyond this lawsuit.

Louisiana-Pacific, reasonably I think, inferred that that was a threat to go public with some of these documents that Louisiana-Pacific regards as confidential or proprietary, or at least to circulate them to other parties. And it's a small wonder at that point that Louisiana-Pacific decided that a confidentiality order ought to be required or in place.

So for those reasons, I find that the--I will make a finding that the vast majority of documents that are requested by virtue of plaintiff's document request are documents that are confidential and/or propriety in nature and, therefore, Louisiana-Pacific acted properly in asking for a confidentiality order.

Now, technically, it seems to me, that Louisiana-Pacific did not go about it in exactly the rule book sort of way. The proper procedure when responding to a document request that requests privileged information or confidential information or propriety

information is to object to the document request and apply for a protective order under Rule 26(c). Louisiana-Pacific did not do that.

However, I cannot fault Louisiana-Pacific for not doing that because it seems to me it effectively did the same thing in a manner that was designed to minimize the possibility that the Court would need to get involved in this controversy.

What it did, rather than objecting and applying for a confidentiality order, was to indicate in its response that all documents would be produced, and there is not a single objection to the request for production of documents. In spite of the fact that the documents requested are broad, in spite of the fact that they request information at plants other than the Kremmling plant where the plaintiff was employed, all documents were going to be produced.

The only request that Louisiana-Pacific made, or stipulation or condition that it made, was that a confidentiality order be entered. A confidentiality order was attached and it was clearly indicated to Mr. Smith that the terms of the confidentiality order were negotiable. Mr. Smith refused to negotiate. He refused to do anything whatsoever.

Instead, what he said was, well, if I don't get those documents by the deposition of June 23rd, I'm going to have to take

Mr. Beldin's deposition not only on June 23rd, but I'm going to have to take it at a future date too. That was what prompted the defendant to file the first motion for a confidentiality order--for a protective order, as I understand it. And that was that the controversy concerning the documents was festering, Mr. Smith was taking the position that he would reserve the right to take a second deposition if the documents weren't produced, he was refusing to sign or negotiate or work on any kind of a confidentiality order, and so that was when the motion for the first protective order was filed.

Based on the findings that I have made here and the findings that I made in the first hearing on July 9th, there is no question in my mind that good cause was shown for that protective order.

The same thing applies with respect to the second protective order, which was the protective order with respect to Mr. Eddins' deposition. Again, Mr. Smith had refused to even consider, negotiate, talk about a confidentiality order on any terms.

I find that his position is essentially frivolous. There is no free speech right to disseminate every document that you get in litigation. I cannot think of a single case that says your right of free speech is infringed because you are subjected to some kind of a confidentiality order in litigation. Otherwise, the resolution might be

that you never got the documents and couldn't speak anyway. Free speech simply has absolutely nothing to do with it, and I find no other right of the plaintiff that's infringed by the imposition of a proper and limited confidentiality order such as that which was proposed here.

That brings me to the final issue in the case, or the final protective order that was sought, and that was the protective order with respect to no fewer than 37 depositions involving some named as well as unnamed deponents. That deposition notice was filed on June 30th, 1992. It is undisputed that plaintiff's counsel did not talk to defendant's counsel about scheduling those depositions.

They did talk about the depositions prior to the stipulated scheduling and discovery order. There's no doubt about that. But that is not the same as sitting down with your opposing counsel and talking about a deposition schedule before you actually notice those depositions. It is not sufficient under the discovery rules or the local rules, the new rules or the old rules, for counsel to willy-nilly notice 37 depositions on five days notice, many of those depositions being deponents or people associated with the defendant, and drop that on counsel five days or six days before 37 depositions are scheduled to commence.

There is no written local rule that says that you have to give counsel notice. I acknowledge that. There is, in my mind, however, no question that that is abusive deposition conduct.

We hear a lot about Rambo litigation and Rambo litigation tactics and harassment, and harassing litigation tactics. If that is not a harassing litigation tactic, I don't know what is. To not talk to your opposing counsel about scheduling, to drop a deposition notice on June 30th that notices 37 depositions, to not tell opposing counsel whose employees or former employees are being deposed what order those depositions are going to go in, and to include in that notice a bunch of people who aren't even identified in the deposition notice, and then to say that those depositions will continue from day to day thereafter until concluded, which could mean God knows when, would you be going in August, would counsel have to reserve all of July, would counsel have to reserve the weekends, nobody knows because Mr. Smith didn't bother to talk to him to figure out exactly what the schedule was. So that's why I granted that motion for a protective order, and that brings me to the issue of sanctions.

Ordinarily deposition and discovery rules are supposed to be self-executing. They can be self-executing by and large only if counsel are cooperative and talk to one another and make themselves

accessible. otherwise, it is a miserable process. It is a miserable process for counsel and it is a miserable process for the Court. And the reason it's a miserable process is because--is illustrated by this hearing. We have now spent almost four hours on this matter.

In that situation where conduct such as this has occurred, I believe that it's justified and justifiable to impose certain limitations on the entire discovery process and to impose those limitations not on both parties alike, but on the party or the attorney who is causing the abuse. And on reviewing the record here, there is no question in my mind, Mr. Smith, that it is your conduct, your obstreperousness and your stubbornness that has caused all of the delay and has caused us to be here for this hearing today. And that was the reason that I imposed the requirement that you clear all future depositions with the magistrate.

Rather than attempting to comply with this Court's order of July 9th, what you did thereafter is almost a flaunting of the order. No sooner had you walked out of this courtroom and I walked off the bench, than I received in chambers a copy of the discovery request for the magistrate which requested not only the litany of the same 37 depositions, including the dead man that you'd already been told was dead, and not only the same request for production of documents, but

also every piece of discovery that you had requested and that I had already told you that you couldn't have.

Now, what I infer from that is that it's difficult for you to learn from what the Court is doing, and so not only am I going to require that you clear the depositions with the magistrate, but I am either going to require that all depositions in this case be taken before a United States Magistrate or that they be taken before a special master. That sanction is expressly permitted by the new local rules, and I told you the last time that we were here that I would apply the new local rules to this case in light of the unusual conduct of counsel in the case.

And what I'm going to do is consult with the magistrate and see if the magistrate has time to do it. If the magistrate doesn't have time to do it, I intend to appoint a special master to preside over every deposition you take. And I do that not only because of your conduct on July 9th, I do it also because I've listened to you this morning and I've listened to you question witnesses. I've listened to you conduct cross-examination, and you can't do it. I think you're just trying to harass everybody here. I think you're trying to harass Louisiana-Pacific, opposing counsel and the Court.

That brings me to the question of fees. Your objections, Mr. Smith, to the fee request and your evidentiary objections are

beneath frivolousness. You have conducted yourself this morning in a way that is obstreperous, obstructionist, non-cooperative, and if every attorney conducted himself in the way that you have conducted yourself here, the courts, this Court and every court, would be bogged down not in substantive motion practice or substantive issues, weld be bogged down in pettifoggery, because that's what you've been doing all morning, is pettifogging.

The request for attorney's fees is supported by evidence in the record. $175.00 an hour is undoubtedly a reasonable fee in this community. Mr. Siebert so testified. In fact, it's lower than his reasonable fee. And 23 hours initially caused me some hesitation. I wondered how Mr. Hedger could have spent 23 hours on the three discovery motions that I've been considering here.

At the conclusion of four hours listening to you argue, Mr. Smith, and talk about these issues, I now understand exactly how he could spend 23 hours on these matters. And I find that 23 hours is an entirely reasonable amount to be spent on these matters. Indeed, Mr. Hedger has not billed for the time of numerous paralegals. He has not billed for the time of his associates. He has not billed for the time of anybody in his firm other than himself. He has not billed for the

time of in-house counsel at Louisiana-Pacific. So, if anything, the amount of time that he has billed for understates this amount.

In addition, your objection that these are not original records in some sense is bewildering, to say the least. What Mr. Hedger submitted was an affidavit with a summary of his time. He didn't submit anybody else's time. He summarized his time, totalled his time and calculated his time at $175.00 an hour. He did that--those were nothing more than summaries, evidentiary summaries. And he authenticated those summaries in his affidavit, and the evidence on which they were based is Exhibit A and Exhibit B, and they were introduced in court.

There is absolutely no requirement that he produce his original notes for your inspection, nor is there any requirement in the cases concerning attorney's fees that the only competent evidence consists of Mr. Hedger's original diary notes which record his time on this matter and all other matters. It is surely proper for him to produce the billing limited to this particular client, and it's surely proper for him to summarize this in an affidavit. So I find that's another frivolous point that you've made.

The reasonable and necessary attorney's fees in this case amount to $4,060.00. Those attorney's fees were directly caused by the

conduct of the plaintiff's counsel. I find no evidence that the plaintiff has had any involvement herself whatsoever in any of this conduct, so those attorney's fees will be assessed personally against David Smith, the counsel for the plaintiff, and those attorneys fees will be paid no later than July 27th, 1992.

Anything further?

MR. HEDGER: Nothing, Your Honor.

THE COURT: Mr. Smith?

MR. SMITH: Your Honor, will there be a written order?

THE COURT: I have no idea. I've already spent about five hours on this case today. I don't know whether I'm going to do a written order or not. I suggest you order a transcript.

What I may well do--in fact that's a good idea--in case I don't order a written order in this case, for the magistrate's guidance, I am going to require a transcript be prepared, and it will be prepared at your expense, Mr. Smith, and that transcript can be furnished to the magistrate.

MR. SMITH: Your Honor, will you stay execution pending appeal?

THE COURT: No. You can get a stay from the circuit court if you want to.

(10:05 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

August 7, 1992

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92-1994 (3)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEANA J. DUNKIN,
DAVID L. SMITH,

Petitioners,

v.

LOUISIANA-PACIFIC CORPORATION,
JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

VOLUME II OF APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH

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Denver, Colorado 80202
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ATTORNEY FOR PETITIONER

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, AND DOUGLAS EDDINS,

Defendants.

ORDER

The court heard numerous discovery disputes in this matter on Thursday, July 9, 1992, and Thursday, July 16, 1992. I have considered the evidence and arguments of counsel. I have also carefully reviewed the file in this matter. On the basis of that review, I have heretofore entered certain oral findings and conclusions from the bench. On the basis of those findings and conclusions, it is

ORDERED as follows:

1. The "Motion for Protective Order Requiring Confidentiality Agreement Prior to Inspecting Documents Requested to Be Produced and to Postpone the Scheduled Deposition of Defendant

James Beldin Scheduled for June 23, 1992" filed June 19, 1992, is GRANTED.

2. The "Motion for Protective Order Requiring Confidentiality Agreement Prior to Inspecting Documents Requested to Be Produced and to Postpone the Scheduled Deposition of Defendant Douglas Eddins Scheduled for June 30, 1992" filed June 29, 1992, is GRANTED.

3. Defendants will forthwith produce all documents requested in "Plaintiff's First Request for Production of Documents to Defendants Louisiana-Pacific Corporation and Douglas Eddins," the court having contemporaneously entered an Order Protecting Confidential Information. All documents produced will be subject to the Order Protecting Confidential Information.

4. "Defendants' Motion for Protective Order and for Attorney Fees" filed July 2, 1992 [concerning "Plaintiff's Notice to Take Depositions" filed and served June 30, 1992] is GRANTED.

5. "Plaintiff's Motion for Reconsideration, Motion to Compel and/or for Sanctions, and Certificate of Compliance With Local Rule 403G" filed July 13, 1992, is GRANTED IN PART and DENIED IN PART, as follows:

(a) Insofar as the motion requests that defendant produce all documents covered by the "First Request for Production of Documents to Defendants Louisiana-Pacific Corporation and Douglas Eddins," the motion is GRANTED. These documents will be produced under the protection of the contemporaneously-entered Order Protecting Confidential Information.

(b) Insofar as the motion seeks answers to the "First Interrogatories to Defendants Louisiana-Pacific Corporation and Douglas Eddins," the motion is GRANTED, and the court finds that defendants have already responded to this discovery.

(c) Insofar as the motion requests some form of sanction arising out of the conduct of defense counsel at a deposition which commenced on May 14, 1992, the motion is DENIED for failure to produce the deposition transcript or any other information in support of the motion's allegations.

(d) Insofar as the motion requests any other sanction against defendants or their counsel, the motion is DENIED.

(e) Insofar as the motion requests reconsideration of my rulings on defendants' motions for protective orders, the motion is DENIED.

6. The request for sanctions contained in "Plaintiff's Response to Motion for Approval of Attorneys' Fees with Affidavit and Plaintiff's Request for Sanctions Pursuant to Fed.R.Civ.P. 11" filed July 14, 1992, is DENIED.

7. Until further order of the court, any deposition which plaintiff hereafter schedules in this matter will be taken pursuant to the terms of the Special Order of Reference to United States Magistrate Judge entered contemporaneously with this Order.

8. "Plaintiff's Request for Approval of Discovery Requests Pursuant to the Court's July 9, 1992 Order" filed July 9, 1992, is DENIED.

9. "Defendants' Motion for Approval of Attorneys' Fees With Affidavit" filed July 13, 1992, is GRANTED.

10. Pursuant to rules 26 and 37 of the Federal Rules of Civil Procedure, plaintiff's counsel, David L. Smith, will, on or

before July 27, 1992, pay defendants the sum of $4,541.25 as a reasonably attorney fee in connection with defendants' filing of the motions for protective orders. This sum consists of the $4,060 documented in "Defendants' Motion for Approval of Attorneys' Fees with Affidavit" filed July 13, 1992, plus an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time).

Dated this 16 day of July, 1992.

BY THE COURT:

/s/
EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243

GEANA J. DUNKIN,

Plaintiff,

vs.

LOUISIANA PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

ORDER PROTECTING CONFIDENTIAL INFORMATION

The court, being sufficiently advised, hereby makes the following findings, conclusions, and orders concerning confidential and proprietary materials:

1. The purpose of this Order Protecting Confidential Information (the "Order") is to protect against the unnecessary disclosure of confidential information. This Order shall apply to documents, and the information obtained from such documents, which are produced by any part in response to discovery requests propounded by another party. This Order shall be binding until superseded by written agreement of the parties or by order of the court.

2. The term "confidential information" as used in this Order means any document produced by any part in this litigation and any information obtained from such documents, including all extracts or summaries which were prepared, in whole or in part, by use of such documents and which disclose information contained in such documents. The plaintiff has requested extensive and voluminous documents from Defendants Louisiana-Pacific Corporation and Douglas Eddins, including but not limited to, personnel and medical files of current and former employees, personnel policies and procedures, EEO-1 reports and affirmative action plans, and OSHA forms and reports. As most of the requested information is confidential and/or proprietary, and because it would be burdensome and costly to identify each page of each document which would be subject to the protections of this Order, all documents produced by the defendants in response to the "Plaintiff's First Request for Production of Documents to Defendants Louisiana-Pacific Corporation and Douglas Eddins" will be treated as confidential until further order of the court.

3. The term "qualified person" as used in this Order means

(a) counsel of record in this action, employees of such counsel to whom it is necessary that confidential information be disclosed, and expert witnesses;

(b) any party in this action to whom it is necessary that confidential information be disclosed.

4. Except pursuant to paragraph 5, no documents subject to this Order shall be made available to persons other than qualified persons or the party who produced the documents, and shall be used only for purposes of this action.

5. If any confidential document, including the information obtained therefrom, is the subject of deposition testimony, or is marked, attached to, or otherwise incorporated in a deposition transcript, the portion of the transcript relating to the confidential document or information shall be deemed confidential and identified as such by placing thereon the following legend on each page of the transcript: "Confidential." Such portion shall, to the extent possible, begin and end on separate pages of the transcript and shall be filed or lodged, if at all, only under seal. Any deponent who is to be shown, or to be questioned with respect to, confidential documents or information shall, prior to receiving such material or prior to any question with respect to such material, be furnished with a copy of this Order and shall acknowledge on the deposition record that he or she has read and understands the provisions of this Order, agrees to comply therewith, and agrees not to disclose the confidential document or information.

6. If and to the extent that any party believes that any documents have been improperly labeled as "confidential" and wishes to disclose such documents outside the terms of this Order, that party shall provide all other parties with reasonable notice of intent to so disclose the documents. "Reasonable notice," as used in this Order, means five (5) business days. If the parties cannot resolve their disagreement with respect to the disclosure of any documents designated as confidential or the propriety of such designation of any document, the parties shall jointly petition the court for a determination of these issues.

7. Nothing in this Order shall prevent disclosure outside the terms of this Order if the party which produced the document consents in writing to such disclosure, or if the court, after notice to all affected parties, permits such disclosure.

8. All confidential information or documents filed with the court, and any pleadings, motions or other papers filed with the court disclosing any confidential information or documents, shall be filed or lodged under seal. Only confidential portions of filings with the court need be filed under seal.

9. Nothing contained in this order [sic] shall affect the rights of any party with respect to any document other than a confidential document obtained through discovery herein, or any

information developed from a source other than a confidential document obtained through discovery herein. Such information or documents may be used without regard to this Order, even if similar or identical information or documents have been designated as confidential hereunder.

Dated this 16th day of July, 1992.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92 N 243

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

SPECIAL ORDER OF REFERENCE TO UNITED STATES MAGISTRATE JUDGE

On July 9, 1992 and July 16, 1992, I held hearings on discovery disputes in this matter. One of these disputes centered on deposition discovery sought by plaintiff. Based on the conduct and demeanor of plaintiff's counsel during the scheduling of these depositions and during court hearings in the case, I have found that counsel's conduct is an harassing abuse of the deposition process. I am also concerned about the sheer number of depositions proposed: this is a rather straightforward case involving allegations of retaliatory conduct and discrimination based on age and sex, and a proposal to take over 40

depositions would at least appear, at first blush, to raise questions concerning the necessity of such depositions in a case of this nature. (By express this "concern," I am making no findings on this question; the magistrate remains free to reach his own conclusions and findings, pursuant to this order.) It is therefore

ORDERED as follows:

1. Pursuant to rule 602 of the United States District Court for the District of Colorado Local Rules of Practice, this matter is referred to United States Magistrate Judge Richard M. Borchers for the purpose of conducting an initial settlement conference and scheduling such further settlement conferences as the magistrate shall deem appropriate. This order is to be construed as a delegation of the court's authority, under Fed. R. Civ. P. 16(c)(7), to direct attorneys and unrepresented parties to appear before it for a pretrial conference to consider "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." Failure to obey the magistrate's orders entered under the authority of this order, to appear at the conference, or to participate in good faith in the settlement conference may result in the imposition of sanctions under rule 16(f) of the Federal Rules of Civil Procedure.

2. Pursuant to 28 U.S.C. § 636(b)(1)(A) (1989) and rule 602 of the United States District Court for the District of Colorado Local Rules of Practice, the matter is also referred to United States Magistrate Judge Richard M. Borchers for the purpose of regulating, overseeing, scheduling, and supervising depositions taken by plaintiff's counsel in this case, in accordance with the following guidelines:

a. Plaintiff's counsel will take no depositions in this case, until further order of the undersigned judge, unless and until he complies with these guidelines

b. Plaintiff's counsel will submit to the magistrate (and serve on opposing counsel) a deposition plan. The deposition will contain the following information:

i. The name of each proposed deponent.

ii. A statement concerning the information which counsel proposes to elicit from each deponent and the manner in which this information is relevant to the subject matter of this litigation or is calculated to lead to admissible evidence. The statement shall be in detail sufficient to allow the magistrate to determine whether a given deposition should be taken at all, whether a given deposition should be postponed until other depositions

are completed, and whether a given deposition would likely be cumulative.

iii. An estimate of the time required for each deposition.

c. The magistrate will review the deposition plan, hold any hearings or conferences which he deems advisable, and enter any orders he deems necessary to allow adequate trial preparation, avoid undue expense and burden, prevent cumulative discovery, and preclude harassing conduct. This authority includes, without limitation, the authority to order that a given deposition not be taken at all, to order that groups of depositions be taken in stages, to set time limits on depositions, and to order that depositions be taken in a certain sequence. In his initial orders entered after reviewing the deposition plan, the magistrate may also set times and dates for any or all depositions.

d. Unless the magistrate sets times and dates for a deposition in his initial orders, plaintiff's counsel shall not schedule or notice that deposition until the magistrate, on counsel's request or motion, approves the proposed time and date. The motion or request shall recite: 1) the efforts which

plaintiff's counsel has made to contact opposing counsel and agree upon the proposed time and date; 2) whether opposing counsel has agreed to the time and date; 3) any other information which the magistrate may require.

e. Unless otherwise ordered by the magistrate, for good cause shown, all depositions taken by plaintiff's counsel shall be taken at the United States Courthouse in Denver, Colorado at a time and date when the magistrate will be available to resolve issues which may arise during the course of the deposition and to accomplish the purposes specified in paragraph 2.c. of this order of reference.

f. Upon a proper showing by plaintiff's counsel that any submission or statement required of him under this order of reference would require him to reveal matters of litigation strategy or tactics or that such submission or statement should not be served on opposing counsel, the magistrate may, upon notice to opposing counsel and opportunity to object, allow the submission or statement to be made ex parte.

g. Nothing in this order of reference precludes plaintiff's counsel from taking depositions of persons not identified in the initial deposition plan, provided that he supplies

the magistrate with the information required in the initial deposition plan, obtains an order from the magistrate permitting the deposition, and otherwise complies with the guidelines set forth in this order.

h. The magistrate may from time to time recommend to this court that plaintiff's counsel be relieved from one or all of the guidelines contained in this order of reference.

Dated this 16th day of July, 1992.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	92 N 243
	)	
LOUISIANA-PACIFIC CORPORATION,	)	
	)	
Defendant.	)	

HEARING - DISCOVERY DISPUTES
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge for the District of Colorado, beginning at 6:00 a.m. on the 3rd day of December, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
1630 Welton Street, # 300
Denver, Colorado 80202

For the Defendant:

Cecil Raymond Hedger, Esq.
Harding & Ogborn
1200 - 17th Street, #1000
Denver, Colorado 80202

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

PROCEEDINGS

(At 6:00 a.m. on December 3, 1992, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U.S. District Judge, with Mr. David Smith appearing as counsel for the plaintiff and Mr. Cecil Hedger appearing as counsel for the defendant, the following proceedings were had:)

THE COURT: Case 92 N 243, Geana Dunkin versus Louisiana-Pacific Corporation. Mr. Smith appears for the plaintiff, Ms. Dunkin, and Mr. Hedger appears for Louisiana-Pacific Corporation.

The matter is before the Court this morning on numerous motions. Perhaps the earliest motion that needs to be taken up is the plaintiff's motion for reconsideration filed November 9th, 1992, which requests reconsideration of a ruling by Magistrate Judge Pringle during the course of a deposition on October 29, 1992.

I've reviewed the motion and I've also reviewed the response which was filed on November 30th. At this time, I will permit the parties to supplement either of their submissions. I have read both submissions carefully and am prepared to rule, but I'll allow you to say

anything that you wish to say. Mr. Smith? By way of supplementation, of course.

MR. SMITH: Yes, Your Honor, David Smith on behalf of the plaintiff. The transcript has now been provided to the Court and the only additional thing that I would say by way of supplementation is that apparently the defendant's argument revolves around this previous ruling by the Court going to the detailed documentation relating to the discrimination issue against the Stacker Building employees. And I would merely--

THE COURT: This is the Stacker in Walden; right?

MR. SMITH: Yes, Your Honor.

THE COURT: And you are alleging that there was discrimination against the Stacker employees in Walden?

MR. SMITH: Yes, Your Honor, and that there were statements made by high level officials relating to that incident showing discriminatory intent that would be relevant to this case. And as I understand the defendant's argument, it is that since this Court previously ruled in connection with certain documents that the plaintiff asked to be turned over, certain detailed documentation relating to the pay and benefits of these Stacker Building employees, since the plaintiff admitted at a previous hearing on a motion to compel with respect to

that documentation that that documentation is only marginally relevant to this discrimination issue, that that means that the whole issue cannot be gone into at all in this case. And that is not what my understanding of this Court's ruling was.

My understanding of this Court's ruling was that the documentation would not have to be turned over, because that kind of detailed documentation is only marginally relevant. But there was no ruling made that the plaintiff could not go into the issue of discrimination.

In fact, this Court has previously ruled, it is my understanding, that pattern and practice type discrimination is in fact relevant in this case, and the Stacker Building employee incident would certainly fit into the category of pattern or practice type discrimination that we would be going into.

THE COURT: Well, you're arguing something a little different than what the magistrate judge ruled. Magistrate Judge Pringle did not permit you to go into pay or benefits concerning Stacker employees. He did not prevent you from asking questions about conversations that Ms. Dunkin may have had with Mr. Eddins in which Mr. Eddins referred to those employees as Mexicans or whatever he referred to them as.

MR. SMITH: Well, Judge, the initial question in this line of questioning dealt with pay or compensation of the Stacker Building employees. At that point, Mr. Hedger insisted on making his objection and refusing to allow the witness to answer any questions, at which point the magistrate was called in.

I tried to explain to the magistrate what this situation was all about. At that point, I told him that this was going into an area of discrimination that I felt was relevant to the issues in this case.

Now, I would admit that his specific little ruling related to the one question that was the initial question in this line of questioning, but the magistrate would not permit really any discussion beyond that one little question, even though I was telling him that this was an initial question in a line of questioning, and then the magistrate said, "Well, you can make your record on whatever you want to make it on," and so I did make a record showing how that this information, if we had been allowed to go into it, would have related to discrimination and should have been allowed. But it was my understanding that he was saying you cannot go into that whole line of questioning relating to pay and compensation of these Stacker Building employees.

THE COURT: Well, Mr. Smith, as has happened previously in this occasion, I simply think you do not listen to judges' rulings. I am

going to read to you from Page 99 of the transcript. This is Magistrate Judge Pringle, and I quote, "Any questions--Line 13--any questions that relate to pay or benefits concerning Stacker employees of the Walden, Colorado plant need not be answered, and the Court directs that the deponent does not have to answer those questions."

MR. SMITH: All of the questions that I had to ask relate to the pay or benefits of those workers.

THE COURT: Well, now that's not what you just argued a moment ago to me. I understood that you were going to offer proof that in the context of a discussion concerning the pay or benefits of the Stacker employees, which discussion was between Mr. Eddins and Ms. Dunkin, Mr. Eddins made some remark about how most of those employees were Mexican and wouldn't understand something anyway.

MR. SMITH: Actually--

THE COURT: --and that, of course, I would say would be some evidence on Mr. Eddins' part of, at least arguable evidence, I'll say, of a bias toward Hispanics, and if you wanted to take the additional jump, or if you wanted to ask the fact finder to take an additional jump, it could be some arguable evidence of general discrimination, or discriminatory intent, even though Ms. Dunkin is not Hispanic and is not bringing a suit based on national origin discrimination.

That's what I thought--the argument I think is attenuated in any case, but I can see how you could ask a fact finder to find that a person who has this intent toward Hispanics is more likely to have a discriminatory intent or animus toward other minority groups, including women. I can see how you might wish to make that argument and how this evidence might tend to prove that argument. That is not what you were asking and that is not what magistrate judge prevented you from asking. All I can do is read what the magistrate judge ruled.

MR. SMITH: Your Honor, I believe that you said it just a moment ago; this was all in the context of asking about pay and compensation for these Stacker Building employees. That was the initial question in this line of questioning.

THE COURT: What you were--

MR. SMITH: And Mr. Hedger's objection to this was we cannot go into this whole line of questioning because the judge has already ruled that the documents relating to pay and benefits of these Stacker Building employees is not to be turned over and, therefore, this whole issue cannot be addressed.

THE COURT: Well, Mr. Smith, there is a distinction between getting into the issue of--the collateral issue of what benefits were paid to Stacker employees at Walden and the question of what statements Mr.

Eddins may have made to Ms. Dunkin in the course of dealing with those benefits.

MR. SMITH: Well, those--let me correct one thing. This does not relate in the first place to a statement made by Mr. Eddins. This relates to a statement made by a higher official at Louisiana-Pacific Corporation by the name of Dick Rydeen. And after what I interpret to be a discriminatory statement was made by this Dick Rydeen, Ms. Dunkin went to Mr. Eddins to speak with him about this statement that had been made.

THE COURT: Well, was Rydeen Eddins' supervisor, or was Eddins Rydeen's--

MR. SMITH: Mr. Rydeen, as I understand it, was Mr. Beldin's supervisor, and there has been testimony and interrogatories answered in this case indicating that Mr. Beldin was the sole decision maker for the decision to cut off my client's disability benefits in this case.

THE COURT: All right, wait a minute. Now, did you say Beldin was Rydeen's supervisor, or Rydeen was Beldin's?

MR. SMITH: Rydeen was Beldin's supervisor. But I just wanted to make that factual correction, that it was Mr. Rydeen who made the statement and not Mr. Eddins who made the statement. It was

Ms. Dunkin's conversation with Mr. Eddins about Mr. Rydeen's statement, is the way this came up. And the only point that I would make further is that, Judge, it seems to me that I'm having a whole line of questioning that has been cut off in this way.

To be honest with you, I don't think that the magistrate understood what was going on, and Mr. Hedger used this situation to just cut off a whole line of questioning; it's improper. I can't conduct depositions this way. You ask one question, an objection is made, a refusal to answer, the magistrate comes in and just cuts off a whole line of questioning; I can't do any--I can't deal with that. That simply is too arbitrary to be reasonable, and I think it was totally improper that the magistrate cut this off.

THE COURT: All right, I'm prepared to rule. This matter was referred to the magistrates, particularly Magistrate Borchers, under my special order of reference of July 16th, 1992 for the purpose of overseeing depositions to be taken by the plaintiff in this case.

Magistrate Pringle, as I understand it, was acting in the absence of Magistrate Borchers and was asked to rule on certain objections that were made during the course of the proceeding involving Mr. Eddins' deposition.

I believe--well, first of all, the statutory standard for my determination of this issue as a district judge reviewing the magistrate's orders is clear, and I can reconsider the order under Section 636 of Title 28 only if the order is clearly erroneous or contrary to law.

I read a moment ago the essence of Judge Pringle's ruling, and the essence of it was that questions relating to pay or benefits concerning Stacker employees of the Walden plant need not be answered. Part of the basis for that ruling was a representation that was earlier made by plaintiff's attorney in this court in the context of another discovery dispute that, in plaintiff's attorney's words, the documents concerning those pay or benefits, the detailed documents, would be "marginally relevant."

I don't see any difference between documents relating to the pay or benefits and questions that are designed to ask or inquire into the very areas covered by the documents.

Magistrate Judge Pringle, contrary to plaintiff's view of this matter, did not rule that Mr. Smith, plaintiff's attorney, was prevented from asking any questions concerning Ms. Dunkin's conversations with Mr. Eddins or concerning statements made by the other gentleman who is Mr. Beldin's supervisor, Rydeen. Any statements made by those people in the context of resolving benefits

concerning Stacker employees could be answered. If Eddins had heard a conversation in which Mr. Rydeen had indicated, for example, that the Stacker employees were mostly Mexican and, therefore, were dumb or didn't understand things, I would think that the plaintiff would be entitled to inquire into that area.

There is a great distinction, however, a great gulf between that sort of limited questioning which would be designed to discover information relevant to this case or information which might lead to other relevant information, and detailed inquiry into the benefits concerning the Stacker employees, which I don't think has anything to do with this case. And in any event, Magistrate Pringle concluded it didn't have anything to do with this case. I think he's not only not clearly erroneous, but he's right, and plaintiff's attorney conceded that he was right as to the details of the discussion with Stacker employees.

For those reasons, I find that the magistrate's ruling contained on Page 99 of the transcript, which is Exhibit D to Mr. Hedger's response in this case, is correct. It is not clearly erroneous, and that ruling of Magistrate Judge Pringle is not reconsidered. Plaintiff's motion is denied.

Now, I hope that's clear enough. I take it there's going to be a continuation of Mr. Eddins' deposition. Is that right, Mr. Hedger, or is that done?

MR. HEDGER: Not to my knowledge, Your Honor. I think we've concluded--I understood plaintiff's counsel to have concluded his deposition.

THE COURT: Well, is Mr. Eddins alleged to have heard a statement made by Mr. Rydeen? Who made the statement supposedly that the Walden Stacker employees were Mexican and, therefore, dumb? Who made that statement?

MR. SMITH: Mr. Rydeen.

THE COURT: To whom?

MR. SMITH: The statement was made to Ms. Dunkin, and then subsequently Ms. Dunkin had a discussion about that with Mr. Beldin and another person by the name of Robert Teal, who was the plant manager at Walden, and then Ms. Dunkin went to the State Department of Labor and got an opinion and then discussed all of this with Mr. Eddins, and that's the reason for the inquiry of Mr. Eddins. Mr. Eddins apparently told Ms. Dunkin to go back to Mr. Teal to get the situation straightened out, and then there were further discussions after that. But the part I was asking Mr. Eddins about was Ms.

Dunkin's conversations with Mr. Eddins about the previous conversation.

THE COURT: Well, Mr. Hedger, I think that particular part of the conversation is proper. I don't think Judge Pringle precluded him from getting into that conversation. However, it concerns me a little bit that the question that Mr. Smith asked is revealed at Page 90, Exhibit E to your motion, related to conversations that Mr. Eddins had with Joy Dunkin. Mr. Smith phrased the question inartfully because he said conversations with Joy Dunkin regarding the type of pay and benefits the Stacker employees at the Walden plant received. One could interpret that as a detailed inquiry into the pay and benefits at the Walden plant, which I believe is irrelevant and which plaintiff's counsel has concluded is irrelevant.

It could also be construed as a way of introducing the topic of a conversation that he had regarding issues arising out of the Stacker employees' plan at Walden, and then he could follow up with questions saying do you remember that you told Mr. Eddins what Mr. Rydeen had said about the Hispanics at the plant. That certainly wouldn't be admissible evidence, but it might lead to admissible evidence, depending on what the answer is. Am I clear on that, Mr. Hedger? You're looking a little puzzled.

MR. HEDGER: Well, may I be heard for a moment, Your Honor?

THE COURT: Yes.

MR. HEDGER: First, this lawsuit does not involve, nor in my wildest imagination would there ever be enough evidence to even justify this lawsuit being surrounded by some sort of pattern and practice type of discrimination.

During the discovery in this matter, there has been evidence of approximately five--from 1984 to the present, five charges of alleged discrimination. One charge was dismissed and nothing else happened. One charge did result in a lawsuit that Mr. Smith was plaintiff's counsel for. That lawsuit was settled before any ultimate determination was made concerning that litigation. There was never ever any charge of alleged discrimination concerning anything having to do with the Stacker employees at the Walden facility.

Moreover, this lawsuit does not involve national origin discrimination. This involves age, sex and handicap discrimination.

We dispute the statement of Mr. Rydeen as, right now, on the basis of the representation of Ms. Dunkin; we dispute that that happened. I'm not going to represent to the Court that it did or did not at this point in time, but my argument, Your Honor, is that in 1987 or

1988, concerning contract employees then employed at Walden with respect to their pay and benefits, if a statement was made to that effect, it was innocuous at best, but in any event, is totally and wholly irrelevant to the issues presented in this lawsuit.

THE COURT: Well, Mr. Hedger, I think marginally relevant might be the more correct term. As I said earlier, it seems to me that plaintiff's counsel should--could at least argue to the fact finder that somebody connected with this decision at Louisiana-Pacific had a general discriminatory animus.

Now, that of course is national origin discrimination, as you point out, and as I pointed out earlier. Ms. Dunkin's case is an age and sex discrimination case.

What I'm suggesting is that Mr. Smith may b able to argue that there is a discriminatory animus in general, or a discriminatory animus that was involved in making the decision in Ms. Dunkin's case. I would think national origin discriminatory animus would at least be something that he would want to argue to the trier of fact, makes it more likely than not that there was also a discriminatory animus with respect to Ms. Dunkin's sex discrimination charge.

Certainly statements such as that attributed to Mr. Rydeen would be some evidence of a discriminatory animus. The

representation that's been made is that with respect to the Stacker employees, he noted that they were Mexican and, therefore, stupid, which if true would be some evidence of discriminatory animus.

It's a bit difficult to me to see exactly where Ms. Dunkin's conversation with Mr. Eddins leads. Suppose that Mr. Eddins testifies yes, Ms. Dunkin told me that Mr. Rydeen had made those statements to her, that doesn't prove anything because somebody who heard the statements of Mr. Rydeen has to be testifying when the case eventually goes to trial, and that's going to be Ms. Dunkin. Ms. Dunkin says the statements were made to her by Mr. Rydeen, and so it's a little difficult for me to see what Mr. Smith is trying to do when he uses or tries to get Mr. Eddins to admit that Ms. Dunkin told him that she had heard Mr. Rydeen make these statements.

I suppose conceivably it could be a prior consistent statement introduced to rebut an implied charge of falsification, should the defendant adopt that strategy at trial. In other words, if the defendant takes the position that Ms. Dunkin is lying when she talks about Mr. Rydeen's statement, then Mr. Smith may want to introduce Mr. Eddins' testimony as a prior consistent statement of Ms. Dunkin.

That's attenuated, there is no question about it, but under the standard of Rule 26, I think he would be entitled to inquire

into that limited area. And it seems to me that by inadvertence, you may have cut him off from that area. I don't think the magistrate did it. The magistrate was pretty clear in what he ruled, and I quoted that earlier.

Is Mr. Eddins ever back in Denver as a matter of traveling in his regular business?

MR. HEDGER: Your Honor, he is now assigned in Nevada with respect to putting on line a new manufacturing facility. I will represent to the Court that I will talk with Mr. Eddins and inquire about his recollection of any conversations with respect to this issue.

THE COURT: Well, with all due respect, that doesn't solve the problem.

MR. HEDGER: Yeah, I understand.

THE COURT: You're not the one who's entitled to inquire. Mr. Smith is entitled to inquire.

All right, to resolve this issue, even though I've affirmed the magistrate's order and refused to reconsider it, I'm going to have Louisiana-Pacific at some time convenient to it bring Mr. Eddins back to Denver for a deposition which will not exceed one-half hour in length, because it seems to me that in a half hour, Mr. Smith can easily inquire into the limited area that I'm going to permit. He's

not going to be permitted to inquire into the details of the Stacker employees' compensation at Walden.

MR. HEDGER: Your Honor, may I suggest the possibility of a telephone deposition in light of the fact that Mr. Eddins--that plaintiff's counsel has had a chance to eyeball Mr. Eddins in terms of his personal appearance here earlier?

THE COURT: I think that's a good suggestion. Mr. Smith, do you want to make any objection to that, or wold that be acceptable to you?

MR. SMITH: I assume that--how would that be arranged? I assume that we can work that out.

THE COURT: Well, telephone depositions are done all the time. The reporter is usually present at the other end of the telephone with the deponent, a I have done it in the past, so that she swears the deponent, and then you conduct the deposition.

MR. SMITH: Will Mr. Hedger then arrange that on the other end?

THE COURT: Well, ordinarily I don't have to get into this refereeing of these kinds of details. It's your deposition, you're entitled to notice it, and I think you are obligated to arrange it if it's to be a telephone deposition. And Mr. Hedger certainly needs to cooperate

with you by telling you where Mr. Eddins can be reached, what the nearest town in Nevada is with a notary public or a court reporter. There's got to be cooperation, but it is primarily your burden because it is your deposition.

Hearing no objection, I am going to order that the deposition of Douglas Eddins be continued by telephone with Mr. Eddins available, I presume, in Nevada and under oath in Nevada and Mr. Smith will not be required to travel, so you'll be able to do it in Denver, Mr. Smith, and Mr. Hedger, you can be wherever you want to. And the basis for that order, frankly, is that, Mr. Smith, I don't think you posed a very clear question or pursued the precise question on the record of conversations in which Ms. Dunkin related to Mr. Eddins her prior conversation with Mr. Rydeen. It's not clear to Mr. Hedger and it's not clear to the magistrate that that's what you wanted to do. What it appears that you wanted to do is get into the detail of the Stacker employees, and that's not going to be permitted.

For those reasons, it seems to me that there was no real interference with your asking the question at the original deposition and, therefore, it's fair and appropriate that your continuation of the deposition should be by telephone so that there's no additional expense

to the defendant in the case in bringing Mr. Eddins back for this limited purpose.

The next matter is plaintiff's motion for reconsideration filed December 2nd regarding Magistrate Judge Borchers' written order relating to the so-called request that Ms. Dunkin made for depositions, the magistrate's order having been filed November 24th, 1992.

Mr. Hedger, you haven't had an opportunity to respond, so I will give you an opportunity to respond. I have to say I'm fully informed. I don't have--I believe I'm fully informed. I have seen what Mr. Smith submitted to the magistrate. I did not read it; I measured it. It was approximately two and a half inches thick, for the record.

MR. HEDGER: Your Honor, just briefly, the motion for reconsideration I received yesterday afternoon on my way out of the office continues to miss the point, with all due respect.

On July the 16th, going back in fact to July the 9th, this Court, on the record, indicated that the plaintiff's counsel was required to detail the information from a prospective deponent in terms of why a deposition was necessary. That is, the plaintiff's counsel was expected, as this Court pointed out on November 4th in its miscellaneous order Number 1, that a reasonable trial lawyer would talk to a witness before they willy-nilly go out and about and try and get a deposition taken.

That is all that Judge Borchers has required in this matter, in conformance with your special order of reference to the magistrate of July the 16th, and all that Judge Borchers has required of plaintiff is a document of any kind indicating that Mr. Smith, a legal assistant employed by Mr. Smith or an investigator employed by Mr. Smith has talked to one of these prospective deponents and has got the following information. And when Judge--Magistrate Judge Borchers indicated any document will do, he made reference to the fact of a telephone message to Mr. Smith or his employees from one of these deponents indicating what Mr. Smith expected them to do.

As Magistrate Borchers observed in his most recent order, the 3,000 or so pages of documents that Mr. Smith filed have nothing whatsoever to do with any information supplied to Mr. Smith or any of his employees concerning what any of these prospective deponents would be expected to testify to and/or why the evidence can't be obtained in any other manner.

Moreover, Your Honor, I'm very, very disturbed by a representation by Mr. Smith on Page 3 of his motion for reconsideration that somehow or another on Monday of this week--excuse me--on Tuesday of this week, on December the 1st, this Court "notified the parties and their attorneys that no extension of the December 18, 1992

discovery cutoff will be granted," and that's after Mr. Smith specifically informed the Court he wished--did not wish it to be extended, and when Mr. Smith admitted in this court that this entire exercise was something that he did not need for trial.

I am-well, I'm sure the Court's aware of this Court's order of--miscellaneous order Number 1 dated on or about November 4, 1992, in which this Court again articulated in writing very, very clearly the deficiencies in the prior deposition plan that plaintiff's counsel had submitted to the magistrate and this Court's denial of that motion for reconsideration of the magistrate's determination.

Again, Your Honor, this instant motion for reconsideration misses entirely the point and picks and chooses appropriate language out of context with respect to prior court orders and does not focus on what this Court expected any "reasonable trial lawyer" to do before throwing forward a deposition plan, particularly, Your Honor, in this instance where plaintiff's counsel, with no information whatsoever, no discovery to date ever asked of us, to expect defendants to sit by willy-nilly and allow their chief executive officer of a major corporation be deposed on something that he has absolutely no personal knowledge. Would request that the Court deny this motion.

THE COURT: All right. I certainly agree with your characterization of what I ordered concerning discovery. I did not indicate that under no circumstances in the world would I extend the discovery deadline, in light of the problems in this case.

What I did do at the hearing earlier this week is to say that the case would be put on a calendar call and set for trial in light of the fact that Mr. Smith represented that a lot of his stuff wasn't necessary for trial.

So I think it's a mischaracterization, undertaken with what motive I do not know, to say that I cut off discovery on December 18th and am, therefore, being unreasonable.

Mr. Smith, I've reviewed your motion. Do you wish to supplement the motion?

MR. SMITH: Yes, I do, Your Honor.

I, first of all, would like to address that issue of the discovery cutoff date, not so much in terms of whether the Court would or would not grant an extension of the discovery cutoff date, but in terms of where the magistrate judge's order leaves me with respect to discovery, since this Court has ordered that there is a discovery cutoff date of December 18th.

Under this latest order, this November 23rd order by Magistrate Judge Borchers, the procedure that he has set up for him to make a final determination as to whether he is going to authorize the plaintiff's depositions in this case is set up in such a way that he is not even going to make a ruling on that point until after 3:30 p.m. on December the 9th.

Now, Your Honor, I have asked that 19 depositions be taken or completed in this case. We began discovery in this case last April, and now what I find out is because of the magistrate judge's scheduling in this case, that what I get is nine days to schedule these depositions, to subpoena the parties and to take their depositions. That simply is not reasonable. I can't do that, Judge. I cannot do all of that, especially with the additional requirements that this Court has placed on me with respect to scheduling these depositions. There is simply no way that I can do 19 depositions in nine days.

And in my opinion, and I am attributing motivation here, but in my opinion, the magistrate judge is doing this on purpose to squeeze the plaintiff. It is simply an abuse of power, and that is what is being done here. There is simply no reason in the world why the plaintiff has to get all of his discovery--her discovery in the nine final days of a discovery cutoff period. It is not fair; it is not reasonable.

These people, most of them are located 120 miles away from Kremling, Colorado. We have no chance to get this discovery done during that time.

Mow the comments about me saying that I did not need this discovery for purposes of trial still hold. In my opinion, all of this discovery that's being done in this case, at least with respect to the depositions, has no purpose except to defend the summary judgment motion. I was not clear the last time we were in here whether you were saying that you were not going to grant a summary judgment motion if the defendants filed it, or whether you were saying that you just were going to limit the discovery cutoff period and not allow any further discovery.

If the Court wishes to state that we--that a summary judgment motion will not be granted even if filed, I'll be happy to waive the depositions. But I need the depositions if a summary judgment motion is going to be filed and heard. And I thought that what the Court was indicating was that we were going to just go directly to trial and not have to go through that whole burdensome procedure of the summary judgment. I'll be happy to waive the depositions if we're not going to do that.

THE COURT: Well, we may be able to work something out here. I see this is about a two or three day trial.

MR. SMITH: Well, perhaps five.

THE COURT: Perhaps three. And perhaps Mr. Hedger might confer with his client and agree with you, and if you two stipulate that neither party will file a motion for summary judgment, we'll take this case to a trial and that will be the result, that may be a way of resolving all of this. The alternative is--

MR. SMITH: I think that would be wonderful, and I think my client would go for that, not having to spend all of this money to take all of these depositions would be fine.

THE COURT: Well, I'll tell you what. You all negotiate that, because I can't force Mr. Hedger or Louisiana-Pacific to forego the right to file a summary judgment motion and avoid trial if they think they have a good motion. And your statement is completely illogical because to say--

MR. SMITH: Well, I don't want to cut off--

THE COURT: To say that this is not necessary for trial, but to rebut a summary judgment motion which wold involve the same issues as would be presented at trial, is simply bizarre. I've never heard that one.

MR. SMITH: Well, Judge, it is not bizarre. Under the summary judgment rules, we're required now to have a paper trial before the trial, and if opposing counsel doesn't want that, well, that's just ducky dandy with the plaintiffs. We wold love not to have a paper trial before the trial.

THE COURT: Well, that can be taken up at a future date. Mr. Hedger, will you consult with your client and see if there's a way to do that? I strikes me that from Louisiana-Pacific's viewpoint, it wold be less expensive to defend a three day trial in this case than it would be to come in here and fight over these depositions on this continuing basis and then pay for your time in setting through all of these depositions.

I'm assuming some depositions are going to be taken. I don't know whether all 19 are going to be taken, but some depositions are going to be taken in the case. It's a matter of when Mr. Smith finally submits something that the magistrate thinks complies and that I think complies with the Court's previous orders.

MR. HEDGER: I most certainly will consult with my client.

THE COURT: All right. I'm not going to take that up any further. Do you have anything further on the motion for reconsideration, Mr. Smith?

MR. SMITH: Yes, Your Honor. And in that light, I have to proceed forward at this point as if the discovery is going to be completed. And I have been attempting to comply with what the magistrate judge has been requiring of me for some period of time now. His latest order on these depositions was November 6th that I have quoted at Page 2, and this was his order, "It is further ordered that plaintiff shall be accorded up to and including November 16, 1992 to submit any documents or other evidence for consideration by the Court for the need for additional depositions."

And after making that order, he nevertheless comes to the conclusion that I have not followed that order. I have no idea what he is talking about. My submission complies fully with that order, and for him to indicate that it does not is--I simply don't understand what he is saying. He originally was requiring that we go out and get affidavits.

THE COURT: All right. I've heard enough. I know the history, Mr. Smith. Sit down. I'm ready to rule.

MR. SMITH: Well--

THE COURT: The motion for reconsideration is denied. Mr. Smith, your position reminds me of Abraham Lincoln's story concerning the little boy who killed both of his parents and then

complained to the court that the court should show him mercy because he was an orphan.

I entered an order in this case on July 16th, 1992 which, as I look back on it, is crystal clear as to what you must do in order to get your depositions taken in this case.

You have submitted deposition plan after deposition plan after deposition plan. As I count them, there are at least three such plans on file now. The first two were the subject of previous orders of this Court, particularly what I've labeled miscellaneous order Number 1. And in that order, I found that you hadn't even come close to complying with what I required in the original July 16th order. Now, miscellaneous order Number 1 was issued, as I recall--

MR. HEDGER: November the 4th, Your Honor.

THE COURT: I was going to say earlier this month. November 4th, 1992. And in the meantime, I extended the discovery cutoff once; the original discovery cutoff was in September. I extended it to December. And still you did not comply.

Finally, on November 16th, you submit to the magistrate an amended deposition plan, and attached to that, as I said, two and one-half inches worth of documents.

The magistrate has responded to that plan by saying I don't quite understand what a driver's license of a third person has to do with these depositions, and he said, in effect, Mr. Smith, you explain that to me. You explain that to me by November 4th, tell me what documents I'm supposed to read.

This is analogous to the defense tactic that is sometimes undertaken in discovery of--which is called box car discovery. You respond to somebody's discovery request by simply pulling up a railroad car full of documents and telling them that the answer to their discovery request is in that railroad car full of documents.

Well, you have, in effect, done that to the magistrate. You've said to the magistrate here are 3,000 pages worth of documents. You read them and figure out why I should be entitled to take these depositions. The magistrate's response is reasonable. He has said you go through the documents and tell me what a driver's license on this page has to do with why I should allow these depositions. He has also scheduled a further hearing on December 9th.

Now, I am a little concerned that the magistrate doesn't act quickly on these matters. And when I say he doesn't act quickly, I mean he doesn't act as quickly as I wold. I wold schedule these things for the following Thursday and they would be done within a week. Not

everybody likes to meet at 6:00 Thursday, and I don't think there's any requirement that *I* impose that on the magistrate, and I don't think that there's any requirement that I manage the magistrate's docket so that he gives this case immediate priority.

You filed the motion on November 16th. The magistrate judge did review what you had submitted. It's evident by his order that he reviewed it, went through it in at least a general way, and filed his order on November 24th. He set a hearing for November 9th. Given the magistrate judge's workload, all of that is reasonable.

So the predicament that you find yourself in is, as Abraham Lincoln's little boy who had murdered both his parents, it's really of your own making, Mr. Smith. You've had four months to submit a deposition plan that complies with my July 16th order. You haven't done it yet, and now you're complaining that the magistrate judge is giving you ten days to do the depositions.

I want to emphasize that that really is a deadline of your own creation. Your remedy, rather than fighting and quibbling and nit picking the magistrate judge, is to see if you can get a discovery extension from this Court. At some point, I'm going to run out of patience with your obduracy, because four months ought to be enough for somebody to submit a deposition plan. I don't think it takes a

rocket scientist to read the order that I entered on July 16th and come up with a deposition plan that complies with it. But you certainly have not done it.

So if you have a complaint with what the magistrate is doing in that it squeezes you, your answer, or the response, is for you to try to get the discovery deadline extended, and I'll consider extending the deadline when that motion is made.

Your motion for reconsideration is denied. At best, it's premature. The magistrate hasn't ruled that you can't take depositions. He scheduled a further hearing, and he's told you to go through the 3,000 pages and tell him how all of that's relevant. That clearly is not an abuse of discretion. It clearly is something that I would have considered had the case been before me. It is not clearly erroneous or contrary to law. It is in conformance with the special order of reference that I entered earlier and it's in conformance with law. It is well within his discretion in supervising discovery. That motion for reconsideration is denied, the one filed on December 2nd.

Before I go any further, I want to return to the previous motion for reconsideration. In the response that Mr. Hedger filed, there was a request, in effect, for sanctions concerning that motion for reconsideration, sanctions in the form of costs, including transcript

preparation, photocopying and attorneys fees in preparing and filing the *response*.

Rule 602 of the local rules in effect prior to June 1st, which govern in this case because the case was filed before June 1st, 1992, Rule 602(c) provides that parties seeking or responding to a reconsideration of a magistrate's order should expect that attorneys fees will be awarded to the prevailing party on such review.

In compliance with that rule and because I think that the motion to reconsider Judge Pringle's order was essentially frivolous, I am going to award reasonable attorneys fees, I am going to award costs, and I am going to award costs including transcript preparation. And I'll say a word about that.

Ordinarily it's the obligation of a party seeking review in a higher tribunal to order a record when asserting that a lower tribunal has committed some sort of error or abuse of discretion. Mr. Smith didn't do that in this case. Rather, Mr. Hedger was put in the position of having to order the transcript to Magistrate Judge Pringle's ruling. The transcript proved to be important because I quoted specifically from it in my ruling denying the motion for reconsideration, because Judge Pringle's ruling was specific and clear. The transcript was necessary for this motion for reconsideration to be determined, and

it's appropriate that the costs of that transcript be taxed to the losing party on the motion for reconsideration.

For those reasons, costs, including costs of transcript preparation and photocopying, and attorneys fees in connection with filing the response to the motion for reconsideration are granted.

I note further that I invited Mr. Smith to withdraw his motion for reconsideration, anticipating that this might arise, that there might be a request for costs or transcripts. Mr. Smith has proceeded full well knowing what the risks were.

MR. SMITH: Your Honor, since I have not had an opportunity to address that aspect, may I make a record on that part?

THE COURT: All right.

MR. SMITH: Your Honor, I think that this issue of attorneys fees under Rule 602(c) has to be addressed in the context of the Tenth Circuit's requirements for making an appellate record. The litigants are in a bit of a bind here. Under the Tenth Circuit's ruling, and I'm sorry I do not have the citation with me. but I didn't now that this issue was going to come up--

THE COURT: Well, Mr. Hedger filed his response requesting this on November 30th, so you had as much notice of his filing as he did of your filing on December 2nd.

MR. SMITH: Well, I don't believe that 602(c) has been mentioned. And what I'm saying is that the principle that is involved here is that if a decision of a magistrate is not appealed to the judge, then one loses one's appellate rights on that issue.

THE COURT: To the circuit court, you mean?

MR. SMITH: No, if a motion for reconsideration is not made from the magistrate to the district judge, the Tenth Circuit has held that the appellate point to the circuit could is lost. So the litigants are put in a position, if you believe that you have a valid point, you must file that motion for reconsideration or you're going to lose that issue on appeal.

It simply can't be the rule that whenever someone makes an appeal of that type from the magistrate to the judge, that automatically, as you are indicating under 602(c), that attorneys fees have to be granted. That is an unreasonable burden. It is an unreasonable punishment to place on a litigant who is legitimately filing an appeal of a point from a magistrate to a district judge. That so chills the right to litigate a case it is unbelievable. If the litigants in cases cannot appeal a case from the magistrate to the district judge because they know that if they lose, if the judge decides that case--that point against them, they're going to have to pay attorneys fees, that simply

cannot be the rule, Judge. That is too punitive. That cannot be the rule.

I suggest to you if that is the rule in 602(c), 602(c) is unconstitutional. And, in fact, I believe that it is unconstitutional for other reasons also. 602(c), it doesn't set up any frivolousness standard. There is no standard at all under 602(c). So I believe that's the reason that the change was made in the new local rules; that automatic attorney fee provision I think any reasonable person knows in simply not legal. And I would simply ask that the Court not assess attorneys fees under that provision.

I would need to ask a factual question also. I didn't understand in your ruling who you were going to assess those attorneys fees and costs against. Is it the plaintiff or is it the plaintiff's attorney or which? Can I get a clarification on that?

THE COURT: I didn't make that clear. I don't think the record before me permits a determination as to whose relative responsibility this is.

MR. SMITH: I would suggest that that rule does not allow attorneys fees against the attorney.

THE COURT: Well, the rule doesn't say.

MR. SMITH: It mentions the word "party." But I would, if I could, like to get a clarification on that point.

THE COURT: Mr. Hedger, do you wish to be heard?

MR. HEDGER: If I may, Your Honor, very briefly.

I think this Court accurately observed earlier in these proceedings this morning that somehow very often Mr. Smith does not listen to either himself, opposing counsel or this Court. Had Mr. Smith taken the time to understand the questions that he was asking Mr. Eddins at the time that I objected, had taken the time to even have the court reporter perhaps read it to him over the telephone and/or even, critically important, gotten a copy of that portion of the transcript from the court reporter, he would have been in a position to evaluate the legal merit of the question posited to the witness, the objection ,the court ruling, and on ad nauseam. Not doing all that, he willy-nilly files motions for reconsideration without any reference to the record and without any reference to any controlling authority in support of his position. It's not--for the record, Your Honor.

THE COURT: Well, I will assess attorneys fees in the case either against the plaintiff or her attorney, depending on whose conduct caused the filing of the motion for reconsideration. That's what Tenth Circuit authority requires me to do, to assess, whether it was the

attorney's conduct or the plaintiff's conduct that caused the filing of the motion.

I note also that it seems to me if Rule--even if Rule 602 were constitutional, Rule 38(a)(4) provides ample authority for this Court to assess attorneys fees on a motion such as this. This was a discovery motion in front of the magistrate. The magistrate could have adjudicated the question of attorneys fees, and a motion for reconsideration is simply a further extension of that discovery dispute, and I don't have any doubt that if somehow there is some infirmity in Local Rule 602, which I don't think there is, Rule 37 provides an ample basis for this.

So next Thursday at the same time, Mr. Smith, you will be prepared to address the question of whether--of whose conduct necessitated or caused the filing of the motion for reconsideration. If it was your decision as a matter of attorney strategy that Ms. Dunkin didn't participate in and didn't approve, then you're going to pay it. If Ms. Dunkin approved it and participated in it, then she will pay them.

Do you understand the issue that I wish to have you focus on and address next Thursday morning?

MR. SMITH: I understand what you're saying, Judge. I don't know that it is appropriate for an attorney--for you to be asking the

attorney of the client to tell you who is responsible. I think that the conduct is on the record. What kind of submission are you asking me to make? An oral argument or a factual admission? What are you asking for in that respect?

THE COURT: I'm asking for some evidence concerning whose conduct caused the motion to be filed.

MR. SMITH: Well, I'm not sure that I understand what you're asking for then.

THE COURT: Well, either you or Ms. Dunkin can make representations to the Court concerning whose conduct is at issue here.

MR. SMITH: I think that the conduct is on the record, Judge. I don't know that it can be separated in that way.

THE COURT: Well, as far as I can tell on the record, it was you who signed the pleading. Is that what you're suggesting?

MR. SMITH: I signed the pleading, yes, Your Honor.

THE COURT: Well, Rule 37 and the Tenth Circuit authority that I'm thinking of, although I don't recall the case, permit the award of fees against the party or against the attorney. And I can't tell, based on this record, whose conduct necessitated the filing here. I notice that you are the one who filed it, but whether you were acting with the

approval of your client or not, I cannot tell. Do you wish to make any further record on that?

MR. SMITH: No, Your Honor. I'm just simply asking who the attorneys fees are being assessed against.

THE COURT: Is it your position that the present record is accurate to permit me to make that determination?

MR. SMITH: Yes, Your Honor.

THE COURT: And your position is that the fees ought to be assessed against who, you or Ms. Dunkin?

MR. SMITH: Your Honor, I don't take a position on that. I don't believe that the fees are assessable in the first place. I was simply asking for a matter of clarification as to who the order ran against.

THE COURT: Well, you say the present record is clear. What's it clear about?

MR. SMITH: I think the present record is clear on the conduct that you are asking me about. As you mentioned, I filed the pleading. Judge, I really don't think it's appropriate for me to be making some kind of representation to the Court as to who should have the blame for doing something that I don't even believe is blamable.

THE COURT: All right, I'm prepared to rule on this. This is not a case where Ms. Dunkin has hidden documents from her attorney

or failed to make discovery or failed to cooperate with her attorney. It's a case where her attorney has filed a pleading with this Court which the Court has found to be frivolous and which is sanctionable under Rule 37. So, Mr. Smith, you will pay the attorneys fees, the costs and the costs of the transcript.

MR. SMITH: Thank you, Your Honor. Is there any date by which I have pay that?

THE COURT: Well, we need to get a determination of the amount, I believe. So, Mr. Hedger, you will next week file your documentation supporting your request for fees and so forth, and I'll make the same order I did on the previous order for attorneys fees. It will be paid within a certain date. We're not going to let this drag out till the end of the case and be swallowed and lost as the case progresses. So the first step in this will be that Mr. Smith, by next Tuesday, will submit documentation. By next Tuesday, I mean December 8th. I said Mr. Smith; I meant Mr. Hedger.

I am going to grant the motion for extension of time to respond to subpoena filed by INA because I take it that INA has been placed in the position by the plaintiff's proposed instructions where it hasn't been able to produce the documents on a timely basis.

Does anybody dispute the representations of INA?

MR. HEDGER: No, Your Honor.

THE COURT: All right.

MR. SMITH: Yes, Your Honor, I dispute the representations that they have been placed in a position of not--of course, I'm not dealing with the insurance company directly; I'm dealing with the defendants. I really don't--I don't know what INA is doing. My document request goes to the defendants and those document requests have been outstanding since last April.

THE COURT: All right, the motion for extension of time to respond to the subpoena is granted, good cause having been shown for that.

The final matter that I can resolve this morning is the matter raised by plaintiff's response to attorney-client privileged correspondence. Although that's styled a response, there is a request at the end of the response asking me to require that the defendants produce those materials.

Upon review of the materials, I find that the information in there isn't quite sufficient to satisfy the defendant's burden of demonstrating that this material is protected by the attorney-client privilege.

In most cases, this is perfectly adequate, and in my experience as a lawyer and as a judge, usually the parties agree that correspondence from an attorney to a client during the course of litigation is not something that either one of them wish to pursue. However, technically I believe that the privilege logs do not satisfy each of the elements of the attorney-client privilege, namely that there be a communication to or from her attorney, to or from a client for the purpose of obtaining legal advice or giving legal advice, and the privilege hasn't been waived by disclosure.

So what I think needs to be done to make the record, Mr. Hedger, is that somebody needs to review all of this correspondence and in some sort of sworn representation under oath to the Court represent that each of these documents either discusses litigation strategy or somehow is communication by an attorney to a client or from a client to an attorney seeking or giving legal advice. And I thought about concluding that the fact that somebody at Louisiana-Pacific sends a letter during the course of this litigation is sufficient evidence, but it really isn't because the letter I suppose could concern your going fishing up in Idaho. There has to be a showing that it concerned legal advice in some way, and it ought to be a sworn showing. So I'll require Louisiana-Pacific to do that.

I'm not ruling this morning on plaintiff's request that this material be disclosed because I think that you ought to be entitled to make a record that what apparently is privileged is truly privileged, and you ought to be entitled to make that by way of affidavit.

MR. SMITH: Your Honor, even though you're not ruling on that this morning, I am confused as to the procedure that we're following here. I thought originally there was going to be an in camera inspection--

THE COURT: You know, Mr. Smith, this is just one more demonstration that you do not listen. I don't know how many times in this proceeding I have said that an in camera inspection, while it is occasionally undertaken as an expedient by some courts, makes no sense in the context of attorney-client privilege. The attorney-client privilege is a privilege to withhold information or not to disclose information to opposing attorneys, to juries, to judges and to anybody in the world, and it's not solved by a court saying well, I'll tell you what, I'll take a look at those in camera. I mean, suppose there's frank discussion in there from the attorney to the client about the nature of the judge. I don't think Louisiana-Pacific would want to disclose that, nor would be required to disclose that.

MR. SMITH: Your Honor, I'm not questioning your decision not to have an in camera inspection. It was just that originally, the representation was made by opposing counsel in this court that he was going to turn over the documentation to you for an in camera inspection. Sometime later, I found out what your position on that issue is, which is that you're not going to conduct in camera inspections.

Now the question I'm asking is what procedure are we following in order to get these documents turned over if that is necessary?

THE COURT: We're following the procedure that's contemplated by the federal rules. The defendant doesn't have to make discovery of privileged documents. That's clear under Rule 26. I think it's also clear, as I recall under the cases, that the burden of proving privilege is with the defendant.

I have just found that the material that the defendant has submitted so far does not technically carry that burden. I have given the defendant an opportunity to submit an affidavit, which will be done no later that December 14th, which will be a further attempt to establish--to carry its burden of proving that the documents should not be disclosed. That's the procedure.

MR. SMITH: And you will make a ruling then without further objection by plaintiff; is that correct?

THE COURT: Well, I don't know. When Mr. Hedger submits that, I assume that you will have something to say about it and you will be given an opportunity to have something to say about it.

Now, as I recall, I had directed the parties to get a pretrial order together; right? The jury room is open and available.

MR. SMITH: May I make--I have been ordered by Judge Abram for a hearing at 7:30. May I be excused to attend that hearing?

MR. HEDGER: Your Honor, may I make a suggestion?

THE COURT: Mr. Hedger?

MR. HEDGER: I have no objection to that. I would request perhaps an opportunity tomorrow to invite Mr. Smith over to my office with the court reporter if we are able to do that. My law partners are having a retreat today a little bit later on and I have been committed to do a presentation at a labor law lecture here shortly.

MR. SMITH: Your Honor, I'm in deposition today and tomorrow.

MR. HEDGER: Monday then.

THE COURT: Well, that's why we have these 6 o'clock hearings is to avoid these little squabbles, I'm in deposition, well, I

can't do it this day, I can't do it this day. Do it right now. Do it right now. You had this prior commitment, you knew you were going to be here till 8 o'clock, you could have gotten Magistrate Judge Abram's matter continued, Mr. Smith. That's your problem. Get back to the jury room.

MR. HEDGER: Thank you, Your Honor.

(7:20 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is correct transcript from the record of proceedings in the above-entitled matter.

January 3, 1993

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

GEANA J. DUNKIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
LOUISIANA-PACIFIC CORPORATION,	)	92 N 243
	)	
Defendant.	)	

HEARING - DISCOVERY DISPUTES
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge for the District of Colorado, beginning at 7:10 a.m. on the 10th day of December, 1992, in Courtroom C-203, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

David L. Smith, Esq.
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For the Defendant:

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Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

PROCEEDINGS

(At 7:10 a.m. on December 10, 1992, in the United States District Court at Denver, Colorado, before the HONORABLE EDWARD W. NOTTINGHAM, U. S. District Judge, with Mr. David Smith appearing as counsel for the plaintiff and Mr. Cecil Hedger appearing as counsel for the defendant, the following proceedings were had:)

THE COURT: Dunkin versus Louisiana-Pacific, 92 N 243. The matter is before the Court on all pending motions this morning. I'm still not sure that I can rule on some of these older motions. by [sic] that I simply mean that motions that have been filed early last month. There is a motion to require plaintiff to pay reasonable costs and expenses incurred by Insurance Company of North America in connection with those documents.

Where are we on the production of those documents, Mr. Hedger? I know INA has received a postponement of time.

MR. HEDGER: Your Honor, I have had a communication--a telephone conversation with counsel with Hall and Evans this week who has indicated to me that a substantial number of those documents are

being Bates stamped and will be forwarded any day. I would be surprised if it's not done by tomorrow.

THE COURT: So this motion will probably be ripe by next Thursday? I'm referring to the motion to require the plaintiff to pay some of the costs, and I'm also assuming that we've gone through the process of having the plaintiff narrow the documents that she wants to have. Wasn't that part of the process?

MR. HEDGER: that [sic] was part of the process, and I'm not sure if those documents were ever narrowed other than what plaintiff's counsel had articulated in a pleading in this court with instructions to the insurance company.

THE COURT: All right. Well, I thought that at the last hearing, I granted the motion for extension of time to respond to the subpoena.

MR. HEDGER: That is correct, Your Honor.

THE COURT: Well, it would appear to me then this motion is not yet ripe for determination at this time. And also there's the issue of the privileged log that you have till December 14th to produce more information, as I recall.

MR. HEDGER: That is correct, Your Honor. May I inquire of the Court as to whether or not that affidavit that was suggested by

this Court is required by outside counsel, or whether Mr. Kelso and myself may submit our own affidavit, Your Honor.

THE COURT: All I'm requiring is that it be a proper affidavit, that it be based on personal knowledge and not hearsay, and that it establish the basis for your knowledge. And I assume that you both have personal knowledge of your bills.

MR. HEDGER: Thank you, Your Honor.

If it would please the Court, with respect to that particular motion on the Insurance Company of North America, during proceedings in this court on November the 19th, 1992, this Court indicated that the plaintiff was to pay the reasonable costs and expenses incurred by the Insurance Company of North America--excuse me--plaintiff was required to pay one-half of the costs of the Insurance Company of North America, and the Insurance Company of North America would be required to pay the other half. You specifically disallowed the requirement that Hall and Evans' fees be paid.

THE COURT: Right. Yes, I'm looking right at that.

Then the only pending motion I believe--well, let me back up one step. There was a motion for sanctions that was filed by the defendant on December 11th, which I thought related entirely to the issue before the magistrate, that is to say that Mr. Smith responded to

the magistrate's order that he specify documents by--specifying additional documents and you moved for sanctions.

Did the magistrate rule on that?

MR. HEDGER: Your Honor, the basis of that motion for sanctions was the revelation in this court that plaintiff's counsel did not need those depositions, and yet we were being forced to respond in and before the magistrate concerning the third submitted deposition plan and the fact that the third submitted deposition plan had not yet met any of the prior court orders concerning this Court's order of July 16th concerning the special order of reference and further orders of Magistrate Borchers--Magistrate Judge Borchers as we've pursued it.

He did not--yesterday before Judge Borchers, Judge Borchers, at a colloquy between the court and plaintiff's counsel, where plaintiff's counsel again articulated he did not need the depositions for trial, only to defend a motion for summary judgment, Judge Borchers then articulated the fact that a pretrial order is due today in this court this morning and that we're on the calendar call tomorrow morning to have a trial date established, indicating that a quick trial date would probably be entered, or an early trial date would probably be entered, and did not then take up any of the plaintiff's deposition plan.

THE COURT: Well, the one sort of loose end is whether the defendant intends to file any motion for summary judgment. At the last hearing, I said I could never be in the position of preventing you from filing a motion that you thought was a good motion if that was the tactic you chose to use.

For some reason which still bewilders me, it is plaintiff's position that plaintiff needs the discovery to respond to a summary judgment motion but does not need the discovery for trial.

MR. HEDGER: I mean, both basically a directed verdict and--

THE COURT: But let's overlook that a minute. Let me ask you the question of whether, after consulting with your client, you've decided you want to file a motion for summary judgment or try the case.

MR. HEDGER: The client has indicated its desire and their desire as individuals to try and get this out on a legitimate motion for summary judgment based upon the issues that we would present and argue to the Court.

THE COURT: All right. That being the case then, we're back in the pickle where for some reason the plaintiff is saying that he needs the discovery to respond to the motion. You can be seated, Mr. Hedger. Maybe, Mr. Smith, you can run this one by me again.

I'm just--to me, there's sort of a contradiction, in fact not sort of a contradiction, there's a blatant contradiction between taking the position that you don't need the discovery to prepare for trial, but you do need it to respond to a motion for summary judgment. So--

MR. SMITH: Well, Your Honor, just to make sure that we're both talking about the same thing, when we're speaking of the discovery, as I told the magistrate in the hearing yesterday, the discovery that's being spoken of is the depositions only, because we need the documents both for the summary judgment motion and for the trial.

As far as the depositions are concerned, however, I do not think that it is absolutely essential to take further depositions other than the ones that are already in progress for any reason other than to defend the summary judgment motion. And I don't see any peculiarity in that position at all. I just don't--I don't think that the depositions are needed for the trial except for impeachment purposes. All of these witnesses that we would depose would appear at the trial and testify, but for purposes of the summary judgment motion, we would obviously need those depositions to defend that motion.

THE COURT: I know you've repeated it--

MR. SMITH: I don't know what you're--

THE COURT: --but I don't understand it. After all, a motion for summary judgment is a motion which suggests that the facts are not disputed and there is nothing to be tried. And if the motion is denied, then of course the case is tried, but the same facts are tried in the trial as are argued to be undisputed in the motion for summary judgment.

MR. SMITH: Your Honor, the Supreme Court and Tenth Circuit decisions that have come down in the area of summary judgment since 1986 have clearly indicated and stated that once that the defendants make some suggestion that a plaintiff cannot prove their case, then at that point, the plaintiff is required to produce all evidence on paper showing their entire case to the Court, or that case can be dismissed.

Under that kind of ruling, I think that the plaintiff has an obligation and in fact I think it would be malpractice not to take all the depositions of all the witnesses in the case so that the entire case can be presented to the Court on paper, as seems to be required by these decisions in the appellate and Supreme Court. And I think that's the clear ruling, the clear indication. I simply cannot proceed in the face of a represented motion for summary judgment by the defendants and tell you that I do not need the depositions. I do need the depositions if a motion for summary judgment is going to be granted. And knowing Mr. Hedger with all the paper that has been filed in this case, I can't

help but believe this will be a far ranging, kitchen sink motion for summary judgment which will require every piece of paper in the documents that have been produced and every depositions to be submitted to the Court in connection with the summary judgment motion.

THE COURT: Well, the summary judgment motion will, I assume, suggest that you have failed to make out a prima facie case, as the Supreme Court has defined that case in McDonald and its progeny. And if you don't have it for summary judgment, how are you going to get it for trial? In other words, if--

MR. SMITH: I will ask the witness to testify at trial, and that will provide the evidence--

THE COURT: So I see what you're saying. You're saying that what you'll be able to do at trial is--you won't need the deposition plan, you'll just call all those witnesses at trial.

MR. SMITH: Yes, Your Honor.

THE COURT: Wrong. That's wrong. I think you must know, Mr. Smith, that the range of testimony at trial is far narrower than the range of testimony at a deposition, and I do see what your thinking is now.

MR. SMITH: Well--

THE COURT: It had not--that line of reasoning had not occurred to me before this moment, and you are most assuredly told that you will not call 91 witnesses for trial of this case, or even 40 witnesses for trial of this simple little Title 7 case.

MR. SMITH: At this point, Your Honor, I think that our discussion two weeks ago becomes more clear, in that I qualified my statement that I did not need the depositions by stating that I only did not need the depositions if Mr. Hedger and the defendants were not going to file their motion for summary judgment. There has now been a clear representation by opposing counsel that they are filing a motion for summary judgment.

We are at the point right now where my motion asking the magistrate to authorize the depositions has still not been ruled on by the magistrate.

THE COURT: All right. I'm going to reverse the magistrate's order and reconsider it sua sponte. I think it's just a misreading of what I've said. I have not withdrawn anything from the magistrate. The magistrate is to review this and rule on it, and since--

MR. SMITH: The simple--

THE COURT: And, you know, I now begin to understand your strategy, Mr. Smith. This isn't your tactical opportunity to get an early

trial and then say this is the day we're aiming for. This Court's practice in case after case, and I am not singling out this case for any special treatment one way or the other, is that I do not set trials--set cases for trial until discovery is concluded.

Now, you can't possibly complete the discovery that you now are in effect saying you want, having heard that they are going to file a motion for summary judgment, by the discovery deadline, can you?

MR. SMITH: Excuse me, I didn't--

THE COURT: You can't possibly complete your discovery by the discovery deadline.

MR. SMITH: Absolutely not, Your Honor, and I said that to the magistrate yesterday, and he said, well, he didn't understand the rulings either, but that he would ask that the Court clarify this matter and he asked counsel to bring this up to the Court this morning for that reason, because I think it is apparent that these depositions cannot be completed by the discovery cutoff date, which is currently set at December 18th, for the reason we can't do the depositions, plus of course we don't have the documents yet either, we, meaning the plaintiff.

And so on both parts, both broad areas of discovery that are being pursued in this case, we simply don't have the information and will not have the information by the discovery cutoff date. And, yes, since a summary judgment motion is going to be filed, I am at this point forced to ask the Court for an extension of the discovery cutoff.

THE COURT: Well, you file your motion. File a motion. I'll consider it. But we're not going to extend discovery forever. I've done it once, I've done it--this is going to be the second time. I'll probably grant your motion, Mr. Smith, but it is utterly clear that the primary reason that you need these extensions of time is because you have fought the magistrate tooth and nail at every point in these proceedings. And so that's why you find yourself in a position where the magistrate has not ruled.

MR. SMITH: I'm not sure I understand the evidentiary basis for what you're referring to, Your Honor.

THE COURT: I'm referring to the entire record in this case, with which I am very familiar.

MR. SMITH: Well, I have filed--

THE COURT: And that is recited in my miscellaneous order Number 1.

MR. SMITH: I have filed three deposition plans and have submitted documentation not required by the rules of civil procedure, and the magistrate has still not ruled on the deposition plans and I still don't have the documents, and that was the reason the first discovery cutoff date was slipped, because the defendants had not turned over the documents. I still don't have the documents; I still don't have the depositions.

THE COURT: Well, you're just repeating yourself, Mr. Smith. The record is made and the record will speak for itself.

The motion for sanctions filed on December 7th is denied. The motion for approval of attorneys fees and costs with affidavit is the matter now before the Court.

I hesitate to ask the question are there any objections to the amount of attorneys fees, $1,807.93.

MR. SMITH: Yes, Your Honor.

THE COURT: All right. Do you have evidence to produce at the hearing, Mr. Hedger?

MR. HEDGER: Yes, Your Honor.

THE COURT: I suspected you did. Proceed.

MR. HEDGER: If it please the Court, defendants at this time would call Mr. Walter Siebert as a witness.

WALTER V. SIEBERT

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, and please spell your last name.

THE WITNESS: Walter V. Siebert, S-i-e-b-e-r-t.

MR. HEDGER: Your Honor, for the record--excuse me--well, for the record, Mr. Siebert was a witness on behalf of an earlier fee application submitted by defendants in that earlier proceeding on July the 16th.

THE COURT: I recall.

MR. HEDGER: He was qualified as an expert--

THE COURT: I recall his qualifications from that time.

DIRECT EXAMINATION

BY MR. HEDGER:

Q Mr. Siebert, have you had an opportunity to examine any documents concerning the instant motion for approval of attorneys fees and costs with affidavit that's presently before this Court?

A Yes.

Q Would you describe what documents you've reviewed?

A I reviewed plaintiff's motion for reconsideration, I reviewed the response and I reviewed another document entitled Louisiana-Pacific Corporation's response to Plaintiff's Second Request for Production of Documents, and I also reviewed the defendant's motion for approval of attorneys fees and costs and the attached affidavit.

Q Did you examine at any time, Mr. Siebert, any time records or computer time records maintained and prepared by the law firm of Harding and Ogborn?

A Yes, I did. I reviewed the time records covering the time period set forth in the affidavit.

Q Based--did you have a conversation or conversations with me concerning some of the background and--background information which led to the filing of the response to plaintiff's motion for reconsideration?

A Yes, basically describing the history of that. I think most of it was set forth in the attachments to the response in opposition to plaintiff's motion for reconsideration.

Q Have you, as a result of your review of the documents and your conversations with me, had an opportunity to form an opinion as to the reasonableness of the time that was expended in defendant's response to that motion for reconsideration?

A Yes, I have.

Q And what is that opinion?

A It would be my opinion that both the hourly rate, which I believe the Court previously found to be reasonable, and the hours expended and shown in the affidavit, Exhibit A, to be reasonable.

MR. HEDGER: May I approach, Your Honor?

THE COURT: Yes.

MR. HEDGER: With respect to an exhibit.

Q (by Mr. Hedger) Mr. Siebert, handing you a two page document that's been marked for identification as Defendant's Exhibit A, I ask that you examine that, and if you can, please identify it.

A Yes, this is a document I previously reviewed prior to the redacting of certain portions of that concerning the time expended on this case. It's my understanding that this is a form similar to what I've often seen before, and it's the time records, once they have been reduced to time written form, and the same is, in Exhibit A, would cover the time period--the first entry shown is 11-10 of '92, the last entry actually shown on Exhibit A is 11-19 of '92. And if I might say, the same applies--would apply to Exhibit B. It is the same type of document, merely covering a different time period, with the first entry being November 30, '92 and the last entry being 12-4 of '92.

MR. HEDGER: Your Honor, Exhibit A and B are copies of the computer runs that are maintained by Harding and Ogborn from my contemporaneous time records. If there's no objection to the introduction of those exhibits, I'll so move their introduction at this time. If there is an objection, then I'll have to become a witness again for all the authenticity and admissibility questions that we went through before.

THE COURT: Any objection, Mr. Smith?

MR. SMITH: Your Honor, I believe that I only have Exhibit A, and there's been reference made to an Exhibit B also.

MR. HEDGER: Excuse me. I inadvertently maybe failed to share it with counsel.

THE COURT: Go ahead.

MR. SMITH: I would like an opportunity to inquire of the witness before I make a judgment.

MR. HEDGER: I have no further questions at this time, Your Honor.

THE COURT: Mr. Smith, that examination took approximately seven minutes. Therefore, in all liberality, I'll give you ten minutes for your cross.

MR. SMITH: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Siebert, what is Exhibit A?

A Exhibit A is--my understanding of Exhibit A is that from Mr. Hedger's contemporaneous time records which he keeps, which is normal practice for most law offices, that is reduced to a time written form which is then submitted to the Accounting Department. This may be either what comes back from the Accounting Department or what went down to the Accounting Department, but it's reflective of the contemporaneous time entries which Mr. Hedger placed or kept during the time he performed the services reflected by these documents.

Q And by these documents, you mean Exhibit A?

A Exhibit A and B.

Q Is Exhibit A a contemporaneous time record?

A It is a reflection of a contemporaneous time record.

Q But I'm asking you whether it is a contemporaneous time record.

A I would consider it to be such. Yes, I would consider it to be such.

Q So these typewritten entries on Exhibit A were made up at or near the time that the time was actually expended to perform the duties shown on Exhibit A; is that correct?

A The entries were actually--the entries reflect the service actually performed on that particular date.

Q But I'm asking you if the entry was made at or near the time that the service was performed.

A Maybe I'm not understanding you. Do you mean, for example if we can look at Exhibit A on the first page, are you asking me whether this typing actually took place at or around the time that Mr. Hedger performed the service?

Q That's correct.

A No, the typing is reflective of the entry that Mr. Hedger made at that time.

Q Have you yourself reviewed any written records that Mr. Hedger made with respect to the entries shown on Exhibit A?

A No, I have not.

Q That was not given to you then as a part of what you reviewed before you came here today; is that correct?

A That is correct; that was not.

Q And does the same hold true for Exhibit B?

A Yes, it does.

Q Now, what is the difference between Exhibit A and Exhibit B?

A Period of time covered. These are both documents reflecting time expended on particular dates for matters concerned with this. The actual verbiage shown on the documents I think is the same--it's the same verbiage that is reflected in the attachment to Mr. Hedger's affidavit.

Q Based on the information in Exhibit A and Exhibit B, you have come to the conclusion that the time actually expended on the matters that are before the Court were reasonable periods of time; is that correct?

A That's correct.

Q How did you come to that conclusion?

A Based on my experience in terms of what time is necessary and reasonable to be expended in performing the various tasks set forth in the diary entries that Mr. Hedger has set forth in Exhibit A and B and which are reflected in his affidavit attachment.

Q How long did Mr. Hedge spend on the response to plaintiff's motion for reconsideration?

A Are you talking about the written response or are we talking the oral response--

Q Let's start with the written response.

A Approximately five and a half hours.

Q And in your opinion, that is reasonable?

A Yes.

Q What did the response that took five and a half hours, what did that consist of as far as a written response is concerned?

A It--my understanding is it consists of a document captioned or titled Defendant's Response in Opposition to Plaintiff's Motion for Reconsideration of Magistrate Judge Pringle's Granting of a Protective Order During Doug Eddins' Deposition on October 29, 1992, and Response in Opposition to Plaintiff's Motion for Reconsideration Filed With This Court on or about November 9, 1992 With Respect to Plaintiff's Third Attempt to Have This Court Order Defendants to Produce Documents Protected by the Attorney-Client Work Product Doctrine to the Plaintiff for Inspection and Copying.

Q And is it your testimony that that entire document took 5.5 hours?

THE COURT: Or just the title of the document took 5.5 hours.

THE WITNESS: Your Honor made a comment earlier about the number of trees. That may also be applicable here. I would say

that--my guess or my opinion would be that the preparation of the entirety of this document, including the review of the deposition, the--

Q (by Mr. Smith) No, I'm just asking you about the document now. I'm asking you whether it took 5.5 hours to prepare that document.

A I guess I was attempting to answer that. I apologize.

Q Go ahead.

A I think it would be my opinion that the document probably took longer than 5.5 hours--

Q No, I'm not asking you for your opinion there. I'm asking you based on the evidence that was presented to you by Mr. Hedger, how long did it take to prepare that document.

A I think I previously answered that based on the time records that he has submitted, 5.5 hours.

Q So it took 5.5 hours to prepare that entire document; is that correct?

A It took--yes.

Q Isn't it correct that that document includes a response that goes to a matter other than to the motion for reconsideration that plaintiff filed?

A It also includes some portion directed towards a motion--attorney-client or attorney work product privileges, yes.

MR. SMITH: Thank you. I have nothing further.

THE COURT: Mr. Hedger, any redirect?

MR. HEDGER: Just one or two questions, Your Honor.

REDIRECT EXAMINATION

BY MR. HEDGER:

Q Mr. Siebert, directing your attention to the first page of what has been marked for identification as Defendant's Exhibit B, further directing your attention to the date entry of November 30, 1992 with the initials CRH, do you see what I'm making reference to?

A Yes.

Q Did you have an occasion, Mr. Siebert, to see the unredacted portion of the first page of Exhibit B on the second portion of the time entry for 11-30-92 for myself?

A Yes.

Q Initials CRH?

A Yes.

Q And there was further time with respect to the November 30 time entries by myself, was there not?

A That's correct.

Q Both the exhibit to my affidavit that you reviewed, as well as the time entry on the first page of Exhibit B, Mr. Siebert, describe work other than the simple preparation of that motion--response to that motion for reconsideration, do they not?

A That's correct.

MR. HEDGER: No further questions, Your Honor.

THE COURT: Mr. Siebert, you may step down. Next witness, Mr. Hedger?

MR. HEDGER: Is there an objection to Exhibits A and B, Your Honor?

THE COURT: Yes, there was.

MR. SMITH: Yes.

CECIL R. HEDGER

was called as a witness herein and, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, and please spell your last name.

THE WITNESS: Cecil R. Hedger, H-e-d-g-e-r.

Your Honor, with respect to first Exhibit A, Exhibit A is a photocopied portion of two pages of a client bill that was submitted to Louisiana-Pacific based upon my time records which I

contemporaneously maintain on a daily basis in a diary. It's submitted into word processing for input into the computer system, and it is input as a policy matter within the law firm of Harding and Ogborn on a daily basis.

Exhibit A, with respect to the time entry of 11-10-92 and 11-19-92 sets forth the entirety of the time that I recorded with respect to the Louisiana-Pacific - Geana Joy Dunkin engagement in the law firm of Harding and Ogborn. I did not, with respect to the request for approval of attorneys fees and costs, as wet forth in the exhibit to the affidavit, request all of the time for either November 10, nor November 19.

Exhibit A, with respect to the client statement that was submitted to Louisiana-Pacific on or about the first part of December is maintained and regularly kept in the normal course of Harding and Ogborn's business operations.

Exhibit B is a copy of what the computer has through that time, December the 4th, Your Honor, concerning time with respect to the motion for reconsideration and our response. Again, on the entry on Exhibit B, Page 1, 11-30-92, the time entry, 5.5 hours, was specifically listed that way for purposes of the potentiality of this hearing. There was other time spent and recorded and will be filled to

Louisiana-Pacific at an appropriate time at the conclusion of our billing cycle. Exhibit B has not been, as we speak, submitted to Louisiana-Pacific Corporation as a legal statement, but will be.

Exhibit B, again, is a copy of what will be a computer generated billing statement to the--to Louisiana-Pacific Corporation based upon contemporaneous time records that I have maintained in a diary, going through word processing into the computer system, and so it appears as it does on Exhibit B. Exhibit B, as well, is maintained in the normal and regular course of Harding and Ogborn's business operations.

THE COURT: Cross-examination, Mr. Smith? Five minutes.

MR. SMITH: No questions, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Mr. Smith, could you tell me why we needed to go through that? Just put that on the record, why we needed to have Mr. Hedger stand up, take an oath and testify concerning the same sort of document that he expressly identified in an earlier hearing in this matter.

MR. SMITH: I did not ask Mr. Hedger to do that, Your Honor.

THE COURT: Well, you objected to the documents.

MR. SMITH: Yes, I did.

THE COURT: Which means that that's the only way that he could get the documents in.

MR. SMITH: Well, I don't know--I have an objection to the documents, I don't think that anything that Mr. Hedger said about it sheds any light on the subject.

THE COURT: All right. Is there a motion to receive the documents?

MR. HEDGER: So moved, Your Honor.

THE COURT: Exhibits A and B--is there an objection, Mr. Smith?

MR. SMITH: Yes, Your Honor.

THE COURT: What's the basis for the objection?

MR. SMITH: I object on the ground that Exhibit A and B are not contemporaneous time records as required by the Tenth Circuit. Secondly, these documents were not submitted before today. If counsel wanted to submit those documents, he should have done it with his motion.

THE COURT: I find the objection frivolous. The exhibits are received.

(Defendant's Exhibits A and B were received in evidence.)

THE COURT: The Court finds that the firm of Harding and Ogborn has or will bill Louisiana-Pacific $1,807.93 in connection with the motion for reconsideration on which I had previously indicated that I would award attorneys fees.

I find, based on the testimony and all the evidence and the file, that the amount expended was in fact spent. I find that the amount of time expended was reasonable and necessary in the circumstances of this case.

Accordingly, Louisiana-Pacific is awarded attorneys fees on this matter of $1,807.93. And I should clarify it by saying that's attorneys fees plus the costs of ordering the transcript that the plaintiff should have ordered in the first place to perfect the record on appeal. That amount has previously, as I recall, been awarded against the plaintiff's attorney based on the previous record. And I gave the plaintiff full opportunity to indicate whether the amount should be awarded against plaintiff or her attorney, and based on the record, that's the best I can do. That amount will be paid by plaintiff's counsel no later than December 17th--I'm sorry--December 16, 1992.

MR. SMITH: Will the Court grant a stay of execution pending appeal?

THE COURT: No.

MR. SMITH: Your Honor, may I ask also the specific statutory or rule citation as the basis for the sanctions?

THE COURT: I've already explained that at the last hearing.

MR. SMITH: Maybe I don't have clarification on that. Was the basis Local Rule 602(c) or was the basis Rule 37?

THE COURT: That's been explained at the last hearing. Perhaps you should listen, Mr. Smith.

Court's in recess.

MR. HEDGER: Your Honor?

THE COURT: Yes, Mr. Hedger?

MR. HEDGER: Excuse me. I know we have been working--

THE COURT: On a pretrial order?

MR. HEDGER: --hard, until like 1 o'clock this morning, to finish and have prepared for this Court--

THE COURT: Very well, I'm sorry. I overlooked that.

MR. HEDGER: --the pretrial order. Your Honor, if I may make a suggestion?

THE COURT: All right.

MR. HEDGER: Yesterday at approximately 11:45 our time, I was in receipt of a fax description which identified for the first time

plaintiff's expert witnesses. If this Court is--and we are and have been in dialogue with Mr. Smith with respect to the need to depose those witnesses. We were informed that we would not be able to take those depositions next week because his experts are not prepared, and the discovery cutoff is December 18th. If this Court is going to entertain a motion that Mr. Smith has represented about extending the discovery cutoff, perhaps it is premature to deal with this at this time.

THE COURT: I'm afraid it is, Mr. Hedger. I thought I heard a representation that I understood before this hearing that the case was prepared for trial, for all practical purposes, and plaintiff was ready to go for trial.

MR. SMITH: That is--

THE COURT: I now see that the--I understand what Mr. Smith's strategy is, that strategy being that he simply intends to call all of these witnesses at trial, and if there's a motion for summary judgment, then he's claiming that he needs to have the witnesses' depositions. So we're right back to square one, in effect, and the magistrate has to decide whether these depositions are really needed for any purpose in this case, and the magistrate will do that.

I'm going to hand the final pretrial order back to you and suggest that you keep it in your drafts and extras folder, because I

don't see any use in us trying to do that now--trying to do a final pretrial order.

The calendar call on this case is vacated. I'm not going to set this case for trial. For one thing, if you're going to file a motion for summary judgment, I can't give you a quick trial date anyway because I have to consider the motion for summary judgment.

Court's in recess.

MR. HEDGER: Thank you, Your Honor.

(7:55 a.m. - Whereupon, the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

January 3, 1993

/s/ Mary C. Chevalier
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN, Plaintiff-Appellant, v. LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS, Defendants-Appellees, ---------- DAVID L. SMITH, Attorney-Appellant.	)	No. 92-1230
GEANA J. DUNKIN, Plaintiff-Appellant, v. LOUISIANA-PACIFIC CORPORATION [SIC], JAMES BELDIN, DOUGLAS EDDINS, Defendants-Appellees.	)	No. 92-1381

ORDER
Entered March 17, 1993

Before McKAY, Chief Judge, and LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL and KELLY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing on banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

Patrick Fisher
Chief Deputy Clerk

28 U.S.C. § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

Fed. R. App. P. 38

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

10 Cir. R. 46.5

The original of every motion, brief (printed or otherwise) and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the bar of this court, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign any motion, brief, or other paper and state the party's address and telephone number. The signature constitutes a certificate that the signer has read the motion, brief, or other paper; that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. If a motion, brief, or other paper is not signed as required by this rule, it shall be refused filing unless it is signed promptly after the omission is called to the attention of the attorney or party. If a motion, brief, or other paper is signed in violation of this rule, the court, upon motion or sua sponte, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include dismissal or affirmance of the appeal, monetary sanctions, and initiation of disciplinary proceedings under the Plan for Attorney Disciplinary Enforcement, or an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, brief, or other paper, including a reasonable attorney fee.

No. 92-1994

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1993

GEANA J. DUNKIN, DAVID L. SMITH,

Petitioners,

vs.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, before discovery is concluded, a monetary sanction pursuant to Rule 37 against counsel currently of record is immediately appealable as a collateral order by an attorney found by the district court to have engaged in harassment, "pettifoggery" and discovery abuse.

2. Whether this Court should review the factual finding of the Tenth Circuit Court of Appeals that Petitioners' appeals of the discovery abuse sanction orders were frivolous and thus subject to sanction, in light of the rule in the Tenth Circuit that such orders are not immediately appealable.

LIST OF PARTIES

The parties to the proceedings below were Petitioners Geana J. Dunkin and David L. Smith, and Respondents Louisiana-Pacific Corporation, James Beldin, Dan Dilworth and Douglas Eddins.[1]

Louisiana-Pacific Corporation does not have a parent company. Louisiana-Pacific Corporation's subsidiaries are Blue Skies Aviation, Inc., Ketchikan Pulp Company, Kirby Forest Industries, Inc., Louisiana-Pacific Corporation (W. Va.), Louisiana-Pacific Corporation de Mexico, S.A. de C.V., Louisiana-Pacific, S.A. de C.V., Louisiana-Pacific Foundation, Louisiana-Pacific International, Inc., Louisiana-Pacific Canada, Ltd., Louisiana-Pacific Trucking Company, Louisiana-Pacific Venture Corp., L-P Foreign Sales Corporation, and New Waverly Transportation, Inc. Louisiana-Pacific Corporation does not have any affiliate companies.

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1. Dan Dilworth was dismissed by the district court as a defendant by order dated May 28, 1992. Appendix to petition for certiorari at 101a (hereinafter "App."). Petitioners nonetheless named him as an appellee in the proceedings in the Tenth Circuit and have named him as a Respondent herein.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is not reported, and is reproduced at page 1a of the Appendix.

STATEMENT OF THE CASE

The case below is a routine employment discrimination case in which Petitioner-Plaintiff Geana J. Dunkin asserts claims pursuant to the Age Discrimination in Employment Act of 1967,

Title VII of the Civil Rights Act of 1964 (sex), and the Colorado Antidiscrimination Act (handicap), and several pendent state law claims. The complaint was filed well over a year ago, on February 7, 1992. Discovery disputes arose between the parties early in the litigation, centering on:

(a) Petitioner-Counsel Smith's refusal to negotiate an order protecting the confidentiality of certain documents Petitioner-Plaintiff Dunkin asked Respondents to produce (including personnel files, medical records, worker's compensation claim files, OSHA files, and other documents which, by policy, were proprietary and confidential); and

(b) Petitioner-Counsel Smith's service of a notice of deposition on Respondents' counsel, six days before the depositions were to commence, identifying 37 deponents (including one who was deceased at the time the notice was served), some by name, others only by category, such depositions "to continue from day to day until completed," without any attempt by Petitioner-Counsel Smith to contact Respondents' counsel to determine his availability or that of any of the deponents.

Because of Petitioner-Counsel Smith's stubbornness and obstreperousness, the fact that Petitioners Dunkin and Smith intended to "go public" with the information discovered on the request for production of documents (App. at 110a), and the fact that Petitioner-Counsel Smith refused to communicate with Respondents' counsel concerning the 37 depositions noticed to proceed following the Fourth of July holiday (which notice was given only six days before the depositions were to commence), Respondents sought protective orders against production of documents absent an appropriate confidentiality order and against the depositions. After hearing argument the district court granted the motions and ordered Petitioner-Counsel Smith (and only Petitioner-Counsel Smith, not Petitioner-Plaintiff Dunkin) to pay

Respondents' attorneys' fees and costs associated with the motions pursuant to Fed. R. Civ. P. 26(c) and 37(a)(4).[2] The court found that Petitioners' opposition to Respondents' request for a confidentiality order was "essentially frivolous" and characterized Petitioner-Counsel Smith's noticing of 37 depositions without any contact with Respondents' counsel as "Rambo litigation tactics and harassment, and harassing litigation tactics." (App. at 114a). The court found that counsel had engaged in a "persistent course of harassment and discovery abuse," (App. at 10a), describing his conduct at one hearing as "obstreperous, obstructionist, non-cooperative, . . . and . . . pettifoggery . . . ." (App. at 117a). The court awarded Respondents fees totalling $4,541.25. (App. at 125a).

The court also ordered Petitioner-Plaintiff Dunkin's discovery to proceed only as approved by, and under the watchful eye of, a Magistrate. The court's order required Dunkin, because of her counsel's "abusive" tactics, among other things to submit a deposition plan to the Magistrate in which Dunkin indicated the name of each proposed deponent, a statement concerning the information counsel proposed to elicit from each deponent and how the information is relevant to the subject matter of the litigation or reasonably calculated to lead to discovery of admissible evidence, and the estimated time required for each deposition. (App. at 124a, 131a-136a).

Petitioner-Plaintiff Dunkin, through her counsel, thereafter filed two deposition plans with the Magistrate, each of which was rejected as not in compliance with the district court's order. She filed a third deposition plan accompanied by approximately 3,000

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2. In the petition for certiorari herein, Petitioners misrepresent that the sanctions were imposed on both plaintiff and her counsel. [Petition for certiorari at 4 ("in connection with the sanctions imposed against Ms. Dunkin and her attorney")].

pages of miscellaneous documents without any explanatory commentary, from which she apparently expected the Magistrate to discern the relevance of the depositions requested. The Magistrate also rejected this third plan, sending it back to Petitioner-Counsel Smith with a direction to relate the documents to the requested depositions if he expected the depositions to be allowed. Petitioner-Plaintiff Dunkin sought reconsideration of this order. She also sought reconsideration of another order entered by the Magistrate restricting the permissible scope of questioning by Petitioner-Counsel Smith on the deposition of Douglas Eddins. (App. 164a-168a).

After oral argument on Petitioner-Plaintiff's motions the district court denied reconsideration. The district court found the motion for reconsideration of the Magistrate's order on the permissible scope of questioning to be frivolous, and awarded Respondents fees and costs associated with responding to the motion pursuant to Local Rule 602C of the United States District Court for the District of Colorado, and alternatively pursuant to Fed. R. Civ. P. 37. (App. at 170a). The fees and costs awarded this second time totalled $1,807.93. (App. at 211a).

Both Petitioners immediately appealed to the Tenth Circuit from the district court's orders awarding fees and costs against Petitioner-Counsel Smith in connection with Respondents' motions for protective order and Petitioner-Plaintiff Dunkin's motion for reconsideration. (Petitioner-Plaintiff Dunkin was named as an appellant below even though no fees or costs were awarded against her, only against her counsel.) The appeals were consolidated for purposes of ruling. After raising the question of jurisdiction *sua sponte* and asking the parties for briefs on the question, the Tenth Circuit dismissed the appeals for lack of jurisdiction based on established circuit precedent that "an order sanctioning counsel currently of record is not appealable before entry of final judgment," either as a final order pursuant to 28

U.S.C. § 1291 or as an appealable collateral order pursuant to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). (App. at 1a). The Tenth Circuit denied appellants' petition for rehearing and suggestion for rehearing *en banc*. (App. at 215a). Petitioners' petition to this Court followed.

In the meantime, the case below languishes. The case is nearly 18 months old, while Petitioners waste time litigating in every court but the trial court, including two appeals to the Tenth Circuit and the present petition for writ of certiorari, and on every issue but the merits of the case.

REASONS FOR DENYING THE WRIT

Petitioners[3] attempt to interest this Court in granting their petition for certiorari by claiming that the decision of the Tenth Circuit below conflicts both with a decision of this Court and with the decisions of five other circuit courts of appeals. Petitioners' claim of conflict is not well-founded.

It is important first to understand the context in which this petition for certiorari arises. The district court below was

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3. Geana J. Dunkin, plaintiff in the action pending in the district court below, has been named as a Petitioner herein, although the district court imposed sanctions only on David L. Smith, plaintiff's counsel, not on plaintiff. Because she was not sanctioned, Ms. Dunkin lacked standing to appeal in the Tenth Circuit, and similarly lacks standing to petition this Court for a writ of certiorari to the Tenth Circuit. *Riggs v. Scrivner, Inc.*, 927 F.2d 1146 (10th Cir. 1991) (employee's attorney, rather than employee, was party aggrieved by district court's imposition of sanctions against attorney; employee did not have standing to appeal the sanctions). At least four other circuits agree with the Tenth Circuit's position on standing. *See DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 918 (1st Cir. 1992); *Bartels v. Sports Arena Employees, Local 137*, 838 F.2d 101, 104 (3d Cir. 1988); *Hays v. Sony Corp. of America*, 847 F.2d 412, 414 (7th Cir. 1988); *Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1276 (9th Cir. 1990).

confronted with exceptionally egregious, abusive *discovery* conduct, as revealed by the court's extensive findings following argument on Respondents' motions for protective order and motions for sanctions:

> Mr. Smith, it is my finding, based on the materials in the file, based on the fact that you didn't call Mr. Hedger before scheduling any of these depositions, based on the fact that you have scheduled 34 [sic] depositions to start on July 6th and to "continue during reasonable time periods thereafter until completed at the office of plaintiff's attorney" etc., based on the fact that you won't agree to any confidentiality order with respect to records and personnel files and other files that are properly regarded as private, . . . it is my finding that you are engaged in a persistent course of harassment and discovery abuse.

(App. at 10a). In ruling on Respondents' request for sanctions, the court noted:

> Alright, I am going to make some findings here concerning the background of this case and what leads us to this stage in the litigation, and I am imposing sanctions, and *I am going to grant the award of fees and I am going to grant them against counsel personally.*
>
> * * *
>
> That brings me to the final . . . protective order that was sought, and that was the protective order with respect to no fewer than 37

depositions involving some named as well as unnamed deponents. That deposition notice was filed [by Petitioner-Counsel Smith] on June 30th, 1992. *It is undisputed that plaintiff's counsel did not talk to defendant's [sic] counsel about scheduling those depositions . . .* It is not sufficient under the discovery rules or the local rules, the new rules or the old rules, for counsel to willy-nilly notice 37 depositions on five days' notice, many of those depositions being deponents or people associated with the defendant, and drop that on counsel five days or six days before 37 depositions are scheduled to commence.

There is no written local rule that says that you have to give counsel notice. I acknowledge that. *There is, in my mind, however, no question that that is abusive deposition conduct.*

We hear a lot about Rambo litigation and Rambo litigation tactics and harassment, and harassing litigation tactics. If that is not a harassing litigation tactic, I don't know what is. To not talk to your opposing counsel about scheduling, to drop a deposition notice on June 30th that notices 37 depositions, to not tell opposing counsel whose employees or former employees are being deposed what order those depositions are going to go in, and to include in that notice a bunch of people who aren't even identified in the deposition notice, and then to say that those depositions will continue from day to day thereafter until concluded, which could mean God knows when, would you be

going in August, would counsel have to reserve all of July, would counsel have to reserve the weekends, nobody knows because Mr. Smith didn't bother to talk to him to figure out exactly what the schedule was. So that's why I granted the motion for a protective order, and that brings me to the issue of sanctions.

Ordinarily deposition and discovery rules are supposed to be self-executing. They can be self-executing by and large only if counsel are cooperative and talk to one another and make themselves accessible. Otherwise, it is a miserable process. It is a miserable process for counsel and it is a miserable process for the Court. And the reason it's a miserable process is because — is illustrated by this hearing. We have now spent almost four hours on this matter.

In that situation where conduct such as this has occurred, I believe that it's justified and justifiable to impose certain limitations on the entire discovery process and to impose those limitations not on both parties alike, but on the party or the attorney who is causing the abuse. And *on reviewing the record here, there is no question in my mind, Mr. Smith, that it is your conduct, your obstreperousness and your stubbornness that has caused all of the delay and has caused us to be here for this hearing today.* And that was the reason that I imposed the requirement that you clear all future depositions with the magistrate.

Rather than attempting to comply with this Court's order of July 9th, what you did thereafter is almost a flaunting of the order. *No sooner had you walked out of this courtroom and I walked off the bench, than I received in chambers a copy of the discovery request for the magistrate which requested not only the litany of the same 37 depositions, including a dead man that you'd already been told was dead,* and not only the same request for production of documents, but also every piece of discovery that you had requested and that I had already told that you couldn't have.

* * *

I've listened to you conduct cross-examination, and you can't do it. *I think you're just trying to harass everybody here. I think you're trying to harass Louisiana-Pacific, opposing counsel and the Court.*

That brings me to the question of fees. Your objections, Mr. Smith, to the fee request and your evidentiary objections are *beneath frivolousness.* You have conducted yourself this morning in a way that is *obstreperous, obstructionist, non-cooperative, and if every attorney conducted himself in the way that you have conducted yourself here, the courts, this Court and every court, would be bogged down not in substantive motion practice or substantive issues, we'd be bogged down in pettifoggery because that's what you've been doing all morning, is pettifogging.*

The request for attorney's fees is supported by evidence in the record. $175.00 an hour is undoubtedly a reasonable fee in this community. . . . and 23 hours initially caused me some hesitation. I wondered how Mr. Hedger could have spent 23 hours on the three discovery motions that I've been considering here.

At the conclusion of four hours listening to you argue, Mr. Smith, and talk about these issues, I now understand exactly how he could spend 23 hours on these matters. And I find that 23 hours is an entirely reasonable amount to be spent on these matters . . . .

In addition, your objection that these are not original records in some sense is bewildering, to say the least . . . .

There is absolutely no requirement that he [Mr. Hedger] produce his original notes for your inspection, nor is there any requirement in the cases concerning attorney's fees that the only competent evidence consists of Mr. Hedger's original diary notes which record his time on this matter and all other matters. It is surely proper for him to produce the billing limited to his particular client, and it's surely proper for him to summarize this in an affidavit. So I find that's another frivolous point that you've made.

The reasonable and necessary attorney's fees in the case amount to $4,060.00. *Those attorney's*

> *fees were directly caused by the conduct of the plaintiff's counsel. I find no evidence that the plaintiff has had any involvement herself whatsoever in any of this conduct, so those attorney's fees will be assessed personally against David Smith, the counsel for the plaintiff, and those attorney's fees will be paid no later than July 27th, 1992.*

[App. at 99a, 113a-117a (emphasis supplied)].[4]

Turning to the applicable law, there is no conflict between the decision of the Tenth Circuit and this Court's decision in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *Cohen* established that 28 U.S.C. § 1291 should be given a practical, not a technical, construction, and recognized the existence of a small class of orders that, although not dispositive of the actions from which they arise, nevertheless determine "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. *Cohen* involved the immediate appealability of an order denying a request to post a bond for the expenses of the defense in a shareholder's derivative action. It did not address whether an order such as the orders at issue here, assessing monetary sanctions pursuant to Rule 37 against counsel currently of record for discovery abuses, falls within the "small class of orders" permitted appeal despite their interlocutory nature. That issue has not been addressed by this Court.

Moreover, each of the decisions of the five circuits cited by Petitioners is factually distinguishable from the decision

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4. The court also awarded fees for appearance at the hearing, bringing the total award to $4,541.25. (App. at 125a).

challenged here. The Tenth Circuit denied immediate appellate review of orders sanctioning current counsel of record for repeated and egregious *discovery* abuses *pursuant to Rule 37* of the Federal Rules of Civil Procedure.

In contrast, *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985), cited by Petitioners at page 13 of the petition for certiorari, involved sanctions assessed *not* against current counsel of record, but against *former* counsel no longer involved in the case, and for abuses that violated *Rule 11* of the Federal Rules of Civil Procedure,[5] not discovery abuses sanctionable pursuant to Rule 37. Prior to *Eavenson* the Third Circuit had held that orders sanctioning counsel currently of record for discovery abuses were *not* immediately appealable as collateral orders under *Cohen*. *Eastern Maico Distributors v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981). In *Eavenson* the Third Circuit distinguished *Eastern Maico*, noting the difference between current counsel and former counsel in terms of their connection with the case, and between conduct that related to discovery activity and conduct violative of Rule 11: "Although not dispositive on the appealability issue, it is important to note that the sanctioned conduct here does not relate to discovery activity, *which is typically related to the merits of the underlying litigation*, but, rather, to the district court's perception, *wholly collateral to the merits of the case*, that appellant deliberately disobeyed a court order granting leave to amend a pleading." 775 F.2d at 538 n. 6 (emphasis added). *Eastern Maico* remains good law in the Third Circuit.[6]

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5. Counsel for plaintiff in *Eavenson* was sanctioned for what the district court perceived as willful disobedience of an order of the court allowing amendment of plaintiff's complaint with certain restrictions, by inclusion in the amended complaint of what the court viewed as restricted material. 775 F.2d at 541-544.

6. The Second Circuit also has noted the significance of the rule under which sanctions are imposed. In *Cheng v. GAF Corporation*, 713 F.2d 886 (2d

(Cont'd)

Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985), cited at page 13 of the petition, is similarly distinguishable. It also involved Rule 11 sanctions against counsel of record, not sanctions for discovery abuses.[7]

The same is true of *TMF Tool Co., Inc. v. Muller*, 913 F.2d 1185 (7th Cir. 1990), also cited at page 13 of the petition.[8] *TMF Tool Co., Inc.* is further distinguishable on three grounds: first, the

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(Cont'd)

Cir. 1983), the court allowed appeal of an order imposing sanctions against counsel currently of record pursuant to 28 U.S.C. § 1927. Counsel was sanctioned for his " 'unreasonable and vexatious'" attempts to disqualify opposing counsel. 713 F.2d at 887. The court distinguished the award of sanctions under § 1927 from sanctions for discovery abuses:

> Moreover, we think the fee award in this case is distinguishable from the Rule 37 situation involved in *Eastern Maico* . . . . the propriety of the award here will not be affected by subsequent developments in the case; it is thus unlike an award of fees for frivolous discovery motions, which "may not be completely separable from the merits of the underlying action," *citing Eastern Maico Distributors v. Maico-Fahrzeugfabrik*, 658 F.2d 944 (3d Cir. 1981).

The court went on to say that "we express no opinion on the appealability of sanctions under [Rule 37(a)(4)] against the attorney rather than the party that he represents." 713 F.2d at 890.

7. The district court determined that a position taken by a defendant in a brief in support of a motion for summary judgment was not well grounded in fact. 771 F.2d at 261.

8. The district court determined that plaintiff TMF's counsel either did not research the applicable law regarding a claim brought against defendant Hans Muller, or chose to ignore applicable law when he served the defendant. 913 F.2d at 1187.

Seventh Circuit ruled only that "an order granting . . . monetary sanctions issued *under the provisions of Rule 11* is an appealable decision" — it did not address the appealability of a sanctions order pursuant to Rule 37; second, at the time the sanctions order was entered, "the underlying claims in the complaint had long been dismissed and the [sanctions] order was intended to end the ancillary aspect of the original litigation," 913 F.2d at 1189; and third, the court did not once mention *Cohen* or analyze the appealability of the sanctions order as a collateral order, instead treating the order as a final judgment entered pursuant to Rule 54 of the Federal Rules of Civil Procedure, appealable as a matter of right as a final order pursuant to 28 U.S.C .§ 1291 based on the fact that the sanctions order disposed of the only remaining issue in the case.

The four Ninth Circuit decisions cited by Petitioners, *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548 (9th Cir. 1986), *cert. denied*, 484 U.S. 823 (1987); *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503 (9th Cir. 1987); *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988); and *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109 (9th Cir. 1990) (all cited at page 14 of the petition), also involve Rule 11 sanctions, not sanctions for discovery abuses.[9] *Riverhead Sav.*

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9. In *Unioil, Inc.* the disrict court determined that plaintiffs' counsel had violated Rule 11 in three respects: (1) failing to conduct a reasonable investigation into the facts upon which class allegations were made or into the potential conflict of interest that was inherent in undertaking representation of the class of Unioil shareholders in an action in which Unioil was one of the named plaintiffs; (2) trying to disengage from class discovery without cause and from the class action suit without court approval; and (3) submitting declarations, in opposition to certain motions of defendants, that plainly did not comport with the requirements for statements under oath. 809 F.2d at 553.

In *Rachel v. Banana Republic, Inc.*, the district court found that the inclusion of Banana Republic, Inc.'s parent company, The Gap, was completely lacking in factual basis. 831 F.2d at 1508.

(Cont'd)

Bank is further distinguishable in that the sanctions awarded were assessed against both the defendant and counsel of record, not just against counsel. The court also limited its holding to the specific facts of the case.[10] 893 F.2d at 1114.

The two Eleventh Circuit cases cited by Petitioners, *Ortho Pharmaceutical Corp. v. Sona Distributors*, 847 F.2d 1512 (11th Cir. 1988) and *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989), *cert. denied*, 495 U.S. 952 (1990), cited at page 14 of the petition, are Rule 11 cases as well; they do not involve discovery disputes, orders or sanctions.[11] *Ortho Pharmaceutical Corp.* is also distinguishable on grounds that the sanctions in question were awarded against both defendants and their counsel. The court's comment, noted by Petitioners, that a sanctions order, whether against a party and counsel jointly or against counsel alone, is dictum as to sanctions orders against counsel alone.

In *Aetna Life Ins. Co.* the district court sanctioned defendants' counsel for filing what it characterized as a frivolous motion to dismiss. 855 F.2d at 1471.

In Riverhead Sav. Bank defendants *and* their counsel were sanctioned for filing frivolous counterclaims against plaintiffs and a frivolous third party complaint. 893 F.2d at 1111.

10. Specifically, where the sanctions were imposed jointly against a party and counsel and were enforceable prior to entry of final judgment.

11. In *Ortho Pharmaceutical Corp.*, the district court awarded sanctions against one defendant and its counsel for filing a motion to dismiss that defendant for lack of personal jurisdiction that the court characterized as "incompetent from its inception." 847 F.2d at 1514.

In *DeSisto College, Inc.* the district court found that plaintiffs' counsel had filed a complaint against two of the defendants without sufficiently researching the Eleventh Circuit's precedent on legislative immunity. 888 F.2d at 757.

Finally, *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985), is completely inapposite. It does not, as Petitioners state at page 15 of the petition, involve a fee award against former counsel (which would distinguish it in any event), but, rather, a motion filed by a nonparty witness (Richard Helms, former director of the CIA) for costs and attorneys' fees incurred in attending an aborted deposition and in successfully defending CBS, Inc.'s contempt petition arising out of his refusal to submit to the deposition. The district court denied Helms' motion, and Helms appealed. The facts could hardly be more distinguishable.

The central purpose of the finality rule embodied in § 1291 is avoidance of piecemeal litigation, promotion of judicial efficiency, reduction in the cost of litigation, and elimination of the delays caused by interlocutory appeals. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). As this Court noted in *Firestone*, at 374,

> Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

This concern is particularly compelling in cases involving discovery orders, including sanctions orders, which are designed to prevent delay and harassment in the discovery process. To allow immediate appeal of such orders would promote the very delay and harassment they are designed to prevent, as is particularly evident from the facts of this case.

Cohen's progeny, in refining the "*small* class of orders" (emphasis added) warranting immediate review, focus on *Cohen's* admonition that review be limited to claims of right that are "too *important* to be denied review and too *independent* of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen,* 337 U.S. at 546 (emphasis added). *See, e.g., Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978), where this Court stressed the narrow scope of *Cohen,* and that the issue to be resolved on appeal must be "*completely* separate from the merits of the action" (emphasis added). Discovery orders, including orders imposing sanctions for abusive discovery conduct, may and often do implicate the underlying claims in the case, and thus are not completely separate, collateral orders. *Eastern Maico Distributors v. Maico-Fahrzeugfabrik,* 658 F.2d 944, 947 (3d Cir. 1981); *Eavenson, Auchmuty & Greenwald v. Holtzman,* 775 F.2d 535, 538 n. 6 (3d Cir. 1985); *Cheng v. GAF Corporation,* 713 F.2d 886, 890 (2d Cir. 1983).[12] *See also, Borden Co. v. Sylk,* 410 F.2d 843, 845-846 (3d Cir. 1969), where the court correctly and ably articulated the concern that interlocutory appeal pursuant to *Cohen* be strictly limited to issues of importance:

> We have detected what appears to be an irresistible impulse on the part of appellants to invoke the "collateral order" doctrine whenever the question of appealability arises. * * * Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for

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12. Not only the courts have suggested a need to distinguish between the type of sanction imposed when considering the propriety of an immediate appeal. At least one commentator has encouraged distinction between the type of sanction imposed when considering whether a sanctions order should be allowed immediate appeal. Lawrence R. Kemm, *Interlocutory Appeal of Attorney Sanctions: In Search of a Standard,* Vol. 25 Indiana L. Rev. 919 (1992).

> efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. * * * *The present case, filed over three years ago and now held in abeyance pending the outcome of this appeal, is a splendid example of the Homeric proportions that such litigation can assume. Our over-burdened courts have little time or appetite for such protractions.* (emphasis added).

Other circuits have stressed repeatedly the short reach of *Cohen* and the need to apply its doctrine "parsimoniously." *See* cases cited in Wright & Miller, *Federal Practice and Procedure* § 3911 at n. 64 (West 1992).

This case is fast reaching the "Homeric proportions" that so concerned the Third Circuit in *Borden Co., supra*. It is Petitioner-Counsel Smith, not the Tenth Circuit or the district court, who has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of the court's power of supervision. Exercising its power of supervision is exactly what the district court did in imposing sanctions on Mr. Smith for his abusive discovery conduct. District courts must be allowed to police such abuse without the specter of interlocutory appeal hanging over them.

Petitioners also suggest that this Court should issue a writ of certiorari to the Tenth Circuit to review the circuit court's routine determination that Petitioners' two appeals to that court were frivolous, and thus subject to sanction pursuant to Rule 38 of the Federal Rules of Civil Procedure. (Rule reproduced in Appendix at 219a). The appeals were taken in the face of recent, clear circuit precedent prohibiting such appeals. The Tenth Circuit determined that the appeals did not present good faith arguments for the

reversal of existing law, in accordance with Tenth Circuit Local Rule 46.5. (Rule reproduced in Appendix at 220a). Nothing in this unremarkable factual determination by the Tenth Circuit warrants review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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